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JUDGES OF THE SUPREME COURT.

WILLIAM D. EVANS, *Chief Justice, Franklin County.*

HORACE E. DEEMER, *Montgomery County.*

SCOTT M. LADD, *O'Brien County.*

SILAS M. WEAVER, *Hardin County.*

FRANK R. GAYNOR, *Plymouth County.*

BYRON W. PRESTON, *Mahaska County.*

BENJAMIN I. SALINGER, *Carroll County.*

OFFICERS OF THE COURT:

GEORGE COSSON, *Attorney General, Audubon County.*

B. W. GARRETT, *Clerk, Decatur County.*

U. G. WHITNEY, *Reporter, Woodbury County.*

JUDGES OF THE COURTS

during the time of these reports, from which appeals may be taken to the Supreme Court.

(NAMES ARRANGED IN ORDER OF SENIORITY OF SERVICE.)

DISTRICT COURTS.

- First District*, two judges—HENRY BANK, Jr., Keokuk; WILLIAM S. HAMILTON, Ft. Madison.
- Second District*, four judges—* F. W. EICHELBERGER, Bloomfield; C. W. VERMILION, Centerville; D. M. ANDERSON, Albia; F. M. HUNTER, Ottumwa; SENECA CORNELL, Ottumwa.
- Third District*, two judges—HIRAM K. EVANS, Corydon; THOMAS L. MAXWELL, Creston.
- Fourth District*, three judges—† JOHN F. OLIVER, Onawa; † DAVID MOULD, Sioux City; GEORGE JEPSON, Sioux City; JOHN W. ANDERSON, Onawa (1915); W. G. SEARS, Sioux City (1915).
- Fifth District*, three judges—J. H. APPLGATE, Guthrie Center; WILLIAM H. FAHEY (1911), Perry; LORIN N. HAYS (1911), Knoxville.
- Sixth District*, three judges—K. E. WILCOCKSON, Sigourney; JOHN F. TALBOTT, Brooklyn; HENRY SILWOLD, Newton.
- Seventh District*, five judges—A. J. HOUSE, Maquoketa; ARTHUR P. BARKER, Clinton; WILLIAM THEOPHILUS, Davenport; MAURICE DONEGAN, Davenport; F. D. LETTS, Davenport; † LAWRENCE J. HORAN, Muscatine.
- Eighth District*, one judge—RALPH P. HOWELL, Iowa City.
- Ninth District*, five judges—† HUGH BRENNAN, Des Moines; W. H. MC-HENRY, Des Moines; LAWRENCE DE GRAFF, Des Moines; CHARLES A. DUDLEY, Des Moines; WM. S. AYERS, Des Moines; HUBERT UTTERBACK, Des Moines.
- Tenth District*, three judges—† FRANKLIN C. PLATT, Waterloo; GEORGE W. DUNHAM, Manchester; CHAS. W. MULLAN, Waterloo; H. B. BOIES, Waterloo.
- Eleventh District*, three judges—R. M. WRIGHT, Ft. Dodge; † C. G. LEE, Ames; † C. E. ALBROOK, Eldora; H. E. FRY, Boone (1915); EDWARD M. MCCALL, Nevada (1915).
- Twelfth District*, three judges—C. H. KELLEY, Charles City; J. J. CLARK, Mason City; M. F. EDWARDS, Parkersburg.
- Thirteenth District*, two judges—A. N. HOBSON, West Union; WILLIAM F. SPRINGER, New Hampton.
- Fourteenth District*, two judges—D. F. COYLE, Humboldt; N. J. LEE, Estherville.
- Fifteenth District*, five judges—A. B. THORNELL, Sidney; ORVILLE D. WHEELER, Council Bluffs; EUGENE B. WOODRUFF, Glenwood; THOMAS ARTHUR, Logan; JOSEPH B. ROCKAFELLOW, Atlantic.
- Sixteenth District*, two judges—† FRANK M. POWERS, Carroll; M. E. HUTCHISON, Lake City; E. G. ALBERT, Jefferson.
- Seventeenth District*, two judges—B. F. CUMMINGS, Marshalltown; JAMES W. WILLETT, Tama.
- Eighteenth District*, three judges—F. O. ELLISON, Anamosa; MILO P. SMITH, Cedar Rapids; JOHN T. MOFFIT, Tipton.
- Nineteenth District*, two judges—ROBERT BONSON, Dubuque; JOHN W. KINTZINGER, Dubuque.
- Twentieth District*, two judges—JAMES D. SMITH, Burlington; OSCAR HALE, Wapello.
- Twenty-first District*, two judges—WILLIAM HUTCHINSON, Alton; W. D. BOIES, Sheldon.

SUPERIOR COURTS.

- Cedar Rapids*—CHARLES B. ROBBINS.
- Council Bluffs*—FRANK J. CAPELL.
- Grinnell*—PAUL G. NORRIS.
- Keokuk*—W. L. MCNAMARA.
- Oelwein*—JOHN R. BANE.
- Perry*—W. W. CARDELL.
- Shenandoah*—GEO. H. CASTLE.

* Died, Oct. 11, 1914.

† Retired, Dec. 31, 1914.

‡ Resigned, April 27, 1914.

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OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA
AT
DES MOINES, JANUARY TERM, 1916
AND IN THE SIXTY-NINTH YEAR OF THE STATE.

ALICE A. WOREZ, Appellant, v. DES MOINES CITY RAILWAY Co.,
Appellee.

EVIDENCE: Memoranda—Conditions of Admissibility. Memoranda
1 made by a disinterested witness in the performance of his duty
and known by him to have been correct when made, and con-
taining statements of fact material to the issue on trial, are sub-
stantive evidence on said issue, along with the witness's oral
testimony in relation thereto. So *held* in a personal injury action,
wherein memoranda made by a medical examiner on plaintiff's
application for insurance were received as bearing on plaintiff's
state of health prior to the accident in question.

EVIDENCE: Best and Secondary Evidence—Signed and Unsigned
2 **Memoranda.** The rule that only the best evidence of which a
cause is susceptible is admissible is not violated by the reception

in evidence of an unsigned memorandum, made by a disinterested witness in performance of his duty, and containing statements material to an issue on trial, even though it appears that there exists, or at one time did exist, in another state, a duplicate of said memorandum, signed by the party against whom the unsigned memorandum is offered.

EVIDENCE: Best and Secondary Evidence—Evidence Beyond Jurisdiction of Court. Secondary evidence is admissible of the contents of a writing when the original (assuming, *arguendo*, it to be such) is beyond the jurisdiction of the party offering it and not within his control.

EVIDENCE: Relevancy, Materiality and Competency—Logical Connection. Evidence, to be relevant, must have some logical connection with or relation to a fact in issue, so as to assist in getting at the truth of it.

PRINCIPLE APPLIED: Plaintiff claimed that her injuries were due solely to a certain accident. Defendant countered with testimony that, prior to said accident, plaintiff, on an application for insurance, stated that she had had rheumatism, etc., and that the examiner had written such statement in the application which plaintiff signed, after which he sent the same to the company in a distant state, and also wrote said statement in a duplicate application which was unsigned. The signed statement was not produced; the unsigned one was presented and received in evidence. Plaintiff testified that she never made any such statement. *Held*, whether the unsigned statement was a correct copy of the signed statement was not relevant to the issue *whether plaintiff had ever made such statement*.

TRIAL: Conduct of Court—Observation as to Witness's Knowledge.

5 The appellate court will not hypercritically analyze every remark of the trial court in passing on the admission or rejection of evidence, and assume that the jury must have understood that the court was reflecting on the witness's former testimony on the point in question. So *held* where the court, in rejecting offered testimony, expressed his inability to understand how the witness could have knowledge on a certain point.

APPEAL AND ERROR: Harmless Error—Properly Excluding Evidence on Poor Objection. If *excluded* evidence is subject to a good objection, it is immaterial that the court excluded it on a poor objection.

EVIDENCE: Relevancy, Materiality and Competency—Personal Injury—Expert Testimony. Testimony as to the ailment from which a plaintiff was suffering at a time prior to the accident

for which recovery is sought may be competently given by a physician who examined her at such prior time, and such testimony may be relevant and material on the issue whether her present condition is due solely to the accident in question.

EVIDENCE: Relevancy, Competency and Materiality—Attendant Incidents. When a fact is relevant, competent and material, then the further incidents which lead up to, explain and are a part of such fact are admissible.

PRINCIPLE APPLIED: Plaintiff claimed that her physical condition was due solely to a certain accident. Defendant countered with a showing that plaintiff was sick long prior to the said accident, in that plaintiff (a) consulted an agent of a lodge of which she was a member as to the lodge's paying sick benefits, and (b) later sent word to the lodge that she was unable to pay the lodge dues *owing to sickness*; and that the lodge paid the said dues. *Held*, proper.

APPEAL AND ERROR: Review—Estoppel. One may not predicate error on the reception of evidence offered by himself.

WITNESSES: Impeachment—Contradiction—Competency of Evidence. A contract between plaintiff and an attorney, wherein the attorney agreed to prosecute an action for damages for a certain injury, is competent to impeach the testimony of plaintiff "that she had never made any claim for damages for said injury."

EVIDENCE: Relevancy, Competency and Materiality—Personal Injury—Former Sickness and Injury. Under the claim that a present physical condition is due solely to a certain accident, any evidence which challenges such claim is relevant, competent and material—for instance, evidence of former sickness or injury or attempts to recover therefor.

APPEAL AND ERROR: Assignment of Error—Omnibus Assignments. Whether the court erred in limiting the reception of certain evidence to a certain purpose is not raised by an assignment "that the court erred in its rulings excluding plaintiff's evidence upon defendant's objections."

DAMAGES: Personal Injuries—Expenditures. There can be no recovery in an action for personal injuries, for expense incurred for physicians, nurse or other expenditures, in the absence of evidence showing the reasonable necessity therefor and the reasonable value thereof.

APPEAL AND ERROR: Reversal—Trifling Deficiency in Verdict. Causes will not be reversed for a trifling deficiency in the amount which might have been allowed—\$5 in present case.

HUSBAND AND WIFE: Wife's Separate Business—Loss of Time,

15 **Etc.—Definiteness Required.** A married woman seeking to recover for loss of time, services, or inability to perform labor or earn money, on the claim that she is engaged in a business of her own, must segregate and make reasonably certain the items of loss for which she may recover from the items for which she may not recover.

DAMAGES: Profits—Recovery—Keeping Boarding House. In an action for personal injuries resulting in an alleged loss of time, services, and inability to perform labor or earn money, the possible *profits* of keeping a boarding house are not an element of recovery.

PLEADING: Prayer—Designatio Unius Exclusio Alterius. A

17 prayer for relief, resting on distinctly enumerated elements of loss, excludes all other elements of loss. Therefore, where plaintiff pleaded that she sustained injuries (a) to certain muscles, (b) to her spinal column, all resulting in great physical and mental pain, and prayed for a recovery of \$12,000, *held*, said pleading covered no claim for "loss of time or services or inability to perform labor or earn money," or expenditures of any kind.

CARRIERS: Carriage of Passengers—Negligence—Instructions. An

18 instruction that the law imposes upon a carrier of passengers an obligation to exercise the highest degree of care to avoid injuries to passengers that is reasonably practicable under the circumstances existing at the time and consistent with the proper and practical management of its affairs, but that the carrier is not an insurer of absolute safety, is not subject to the vice of making the mere *convenience* of the carrier a vital consideration.

CARRIERS: Carriage of Passengers—Negligence—Stopping and

19 **Starting of Cars—Instructions.** The claim of negligence in starting a car cannot be sustained, if the evidence shows that it was started in a prudent and careful manner, and after the passenger had had reasonable time to enter the car while it stood still.

NEGLIGENCE: Instructions—Erroneous Instructions—Harmless Er-

20 **ror.** A misdirection as to what will constitute negligence on the part of defendant is entirely harmless when the jury returns a verdict for plaintiff, and thereby necessarily finds that defendant was negligent.

TRIAL: Instructions—Erroneous But Harmless Instruction—Psycho-

21 **logical Effect on Verdict.** Where the jury returned a verdict for plaintiff, in spite of the fact that, by an erroneous instruction, the court gave defendant an unjustifiable chance to escape,

error may not be predicated, on appeal, because of the inadequacy of the verdict, on the subtle argument that such erroneous instruction had a bad psychological effect on the amount of the verdict.

DAMAGES: Pain and Suffering—Future Pain—Permanency of In-
22 juries—Instructions. An instruction allowing a recovery for future pain only in case the injuries from which the pain comes are *permanent*, is erroneous.

APPEAL AND ERROR: Parties Entitled to Allege Error—Error on
23 Non-Issue. A plaintiff may not complain of an instruction which erroneously limits his right to recover on an issue *not made by the pleading and not mutually tried out by the parties*. So *held* where the court erroneously instructed as to the recovery for future pain, no such issue appearing in the record.

PLEADING: Issue, Proof and Variance—Issue Without Written
24 Plea—Waiver. One may not be said to have mutually agreed with his adversary to try out an issue not raised in the written pleadings, by failing to object to evidence which, though bearing on and tending to prove such non-paper issue, was also admissible on other issues which the written pleadings did raise.

PRINCIPLE APPLIED: Plaintiff, in an action for personal injury, did not, in the written pleadings, raise any issue as to pain and suffering *in the future*; i. e., later than the time of trial. She did plead that she was permanently injured; that she was injured in certain muscles, in her spinal column, and “has suffered almost constant physical pain and severe mental anguish since she was injured.” Evidence was received, *without objection by defendant*, tending to show what injuries she had sustained and what her suffering had been up to the time of trial. This necessarily bore also on her non-paper claim that she would suffer subsequently to trial. But *held* that, inasmuch as such evidence was clearly admissible on the written issues, failure to object could not work a waiver of the right to demand written plea of “*future pain*.”

PLEADING: Issue, Proof and Variance—Personal Injury—Future
25 Pain—Sufficiency of Pleading. Pain and suffering subsequent to time of trial must be specifically pleaded, if such pain and suffering do not naturally follow proof of that which is pleaded; and the lapse of a long time between the filing of petition and date of trial may have material bearing on the question. Pleadings reviewed, and *held* not to count on such pain and suffering later than the time of trial.

PRINCIPLE APPLIED: Petition was filed April 25, 1912, in which plaintiff pleaded that she was painfully and permanently

injured on December 7, 1911; that she was injured in the muscles and ligaments of her leg; that her spinal column was injured, with results, at times, resembling paralysis; and that "she has suffered *almost constant* physical pain and severe mental anguish since she was injured." The trial was had on March 1, 1913. The issue of permanent injury and pain and suffering down to time of trial was submitted. The verdict was for \$200, from which plaintiff appealed because inadequate. *Held*, the claim that suffering would continue for more than practically a year could not be naturally deduced from what was pleaded, and therefore the pleading raised no issue as to suffering subsequent to trial. (The court says: "The point is close; but *affirmance*, rather than *reversal*, has the benefit of reasonable doubt.")

PLEADING: Construction—Future Pain—Conditions Surrounding
26 Trial and Verdict. On the question whether a pleading counts on future pain and suffering, i. e., later than time of trial, the appellate court will give material consideration to the conditions surrounding the trial, including the time elapsing from the date of injury to date of trial, and the smallness of the verdict which the lower court held to be justified by the evidence.

Appeal from Polk District Court.—CHARLES A. DUDLEY,
 Judge.

WEDNESDAY, MARCH 15, 1916.

SUIT for personal injuries. Verdict for plaintiff. Plaintiff appeals, claiming that the verdict is inadequate.—*Affirmed*.

O. M. Brockett and John McLennan, for appellant.

Parker, Parrish & Miller and A. G. Rippey, for appellee.

SALINGER, J.—I. The witness Lambert testified that, in the fall of 1910, he took the application of plaintiff for sickness and accident insurance; that the application was taken in duplicate; that plaintiff signed one and not the other; that the signed application was transmitted to the insurer in the state of New York, and that witness does not know where it now is. The witness produced the unsigned duplicate, and it is known in this record as Exhibit 1. It is written therein

1. EVIDENCE:
 memoranda;
 conditions of
 admissibility.

that applicant had in the past had "acute attacks of rheumatism at times, but not severe." The witness says that these words are in his writing; that, when he prepared the blank, the plaintiff, as witness recalls, said that she had had at times attacks of rheumatism; that he made this written statement from what plaintiff said just before he made it, and wrote down her statement correctly as plaintiff stated it. Thereupon, defendant offered Exhibit 1 in connection with the testimony of this witness, so far as it relates to said statement. We have to determine whether objections made to this testimony, and to this exhibit, that same are incompetent, immaterial and not the best evidence, were rightly overruled. We shall not attempt to follow the counsel into all the ramifications of their dispute on this point, but hold that the objections are not well made, because:

1. The testimony and the introduction of the paper was no attempt to prove by secondary evidence the contents of the signed paper sent to New York. It is all merely the equivalent of (1) testimony that plaintiff made statements as to the condition of her health prior to the accident in suit, and that the witness, at the time the statement was made, correctly reduced it to a written memorandum; and (2) thereupon introducing said memorandum. In a general way, it is the equivalent of a memorandum made by a disinterested person before any controversy arose, which he knows he made truly at the time when he made it, because he remembers what was said, and his thereupon testifying, independently of the writing, what was said. Neither the oral testimony nor the admission of this memorandum violated any rule as to best, or as to primary and secondary evidence. All was merely a method of showing what oral statements plaintiff had made as to her bodily condition at a time before the acts of defendant injured her.

2. On any theory, the testimony was not objectionable, because the original was outside of the jurisdiction and in the

2. EVIDENCE: best and secondary evidence: signed and unsigned memoranda.

state of New York, and not under the control of the party offering it, and because the party who had the original is not a party to the suit.

2. EVIDENCE: best and secondary evidence; evidence beyond jurisdiction of court.

As we read it, the text in 17 Cyc. 527, militates against, rather than helps, the position of appellant. It declares fairly that, where a paper is out of the jurisdiction, the ordinary rules as to secondary evidence do not govern. *Hawkins v. Rice*, 40 Iowa 435, merely holds that a written assignment cannot be established by parol upon a showing that the instrument had been sent to the clerk for record and not returned, because such assignment is still constructively in the possession of the assignee; and *Grimes v. Simpson Centenary College*, 42 Iowa, at 590, applies said ordinary rules because there was no positive and direct evidence showing where it was or who had the contract at the time of the trial, or that it was lost or mislaid. We think *Adams v. Coulliard*, 102 Mass. 167, 173, squarely sustains the trial court.

Kennell v. Boyer, 144 Iowa, at 306, is that memoranda made in a transaction where the maker acts as agent for both parties are admissible. *Donovan v. Boston & M. R. Co.*, (Mass.) 33 N. E. 583, 584, holds memoranda are admissible where there is no reasonable possibility that they were intentionally made incorrect; where made by one acting in the line of duty and in the usual course of employment, under conditions which tended to make the entry correct; made before any controversy had arisen, and when all concerned had no interest other than to know and state the truth. According to *Inhabitants of Townsend v. Inhabitants of Pepperell*, 99 Mass. 40, on issue of the insanity of a patient during a certain period, a record of his condition and treatment as a patient in a hospital, produced at a trial 40 years after its date by the superintendent of the hospital as part of a series of records of which he is the official custodian, purporting to be contemporaneously made by the attending physicians, and which it is their duty to make, is admissible in evidence as a foundation for the

opinion of an expert whether it indicates mental disease of the patient, without identifying the person who made it. *State v. Brady*, 100 Iowa 191, 200, decides that, in a prosecution for embezzlement from a railroad corporation, memoranda consisting of the records of its ticket office, showing daily sales there during a given year, should be admitted, where it is conceded that the agent could not know from memory the facts stated in the memorandum, and are admissible as substantive evidence under the same circumstances as if a witness said he knew they were true when made, but had no independent recollection either before or after examining them as to the sales to which they refer. In *Graham v. Dillon*, 144 Iowa 82, we hold that, if a witness can testify that at or about the time a memorandum or entry was made he knew its contents, and knew it to be true, his testimony and the memorandum are both competent evidence, although the witness cannot testify to the facts as a matter of independent recollection, even after his memory has been refreshed. And see *Edwards v. City of Cedar Rapids*, 138 Iowa, at 423, 424.

II. As we view it, the only material testimony given by the witness Lambert was that the duplicate, Exhibit 1, truly states something which the plaintiff told the witness. Plaintiff was allowed to contradict this by stating that she was never, in fact, afflicted with rheumatism, and that she did not tell him that she had suffered acute attacks of rheumatism, but that they were not severe ones. It is complained that she was not also permitted to say that the duplicate was not a true copy of the signed application. Whether it was or not is material and relevant to nothing before the court when this testimony was excluded. Whether the signed application sent to New York did or did not contain this statement as to rheumatism had no bearing on whether such declaration as the witness wrote into the duplicate was made. That witness made this written memorandum in but one paper, rather than in two, did not affect the material portions of his testimony.

4. EVIDENCE: relevancy, materiality and competency: logical connection.

2.

In sustaining objection to this, the judge said that he did not know how the plaintiff may know whether this statement is contained in the original, the original not being in court. We do not agree to the claim that this

5. TRIAL: conduct of court: observation as to witness's knowledge.

not only excluded the proposed testimony but discredited and destroyed evidence put in earlier. That the court thought that the witness might not be able to say from memory whether the duplicate was a copy of the other did not indicate to the jury that she could not be able to remember whether or not she ever made a statement that she had had acute attacks of rheumatism. At any rate, there is neither error point nor brief point which complains of this alleged misconduct of the trial judge. The objection presented to us is that this testimony was excluded, and not the manner in which it was excluded.

3.

We see no force in the argument that, even though this evidence might rightfully have been excluded on rebuttal because it was not rebuttal, or was a repetition, it was error

6. APPEAL AND ERROR: harmless error: properly excluding evidence on poor objection.

to exclude it on the objection made that it was not the best evidence. In the first place, testimony that a paper before the court is not a true copy of one not before the court is vulnerable to the objection of not being the best evidence. Moreover, while, where complaint is made of the *overruling* of an objection, the trial ruling will not be disturbed unless objection covering the point was made, this rule of appellate review is based on the thought that, if specific objection had been made below, the ruling might have been different, and no occasion to appeal have arisen. This is not the rule where the sustaining of an objection is complained of. Where for any

reason it was right to sustain the objection, the ruling will not be disturbed because it was made without the presentation of sufficient argument, or without apprehension of the true reason for making it. *In re Will of Crissick*, 174 Iowa 397.

III. Complaint is made of overruling the plaintiff's objection to evidence of Dr. Lambert, which was to the effect that plaintiff was brought to his office in March, 1910, about one year and nine months before accident in

7. EVIDENCE: relevancy, materiality and competency: personal injury: expert testimony.

suit; that she then completed a claim for some accident that she had had; that she said she had fallen down a stairway and hurt her shoulder, and that no one saw this accident,

and that Lambert was of opinion that the trouble was due to a rheumatic disease of the shoulder. The assignment refers us to lines 18 to 32, page 50, of abstract. There we find that Lambert does say that plaintiff was then brought to his office to complete a claim for some accident that she had had; that she said she had fallen down a stairway and hurt her shoulder, and that no one saw this accident; and that he made an examination of the shoulder at that time. We also find that no objection whatever was made to this. But there was this, more:

"Q. What was your opinion at that time as to what was ailing that woman's shoulder? (Objected to as incompetent, irrelevant and immaterial to any issue in this case. Overruled. Exception.) A. I was of the opinion that the trouble was due to a rheumatic disease of the shoulder."

This testimony is not incompetent, because it appears that witness was a practicing physician of at least 10 years' experience. It is not irrelevant and immaterial to any issue in the case, because it is relevant to the inquiry whether injury to health or body shown on this trial was wholly due to the accident sued for or wholly or partly to something that occurred before this accident.

Upon examining the abstract as referred to in another assignment, we find this as to witness Bonner:

8. EVIDENCE: relevancy, competency and materiality: attendant incidents.

“Q. Do you remember of her coming to you as an agent of this company and making any claim with reference to sick benefits in August, 1907? (Objected to as irrelevant, immaterial and incompetent. Overruled. Exception.) A. She did not come to me; she sent for me. Q. What conversation did you have with her relative to her physical condition? (Same objection, ruling and exception.) A. That was about eight years ago. She was having some trouble. She sent to me to ask me whether our company allowed any sick benefits. I had a long conversation with her. She and her husband were members. Later, she sent word to the lodge that her husband and she were unable to pay their dues on account of sickness. Q. Were the dues remitted? (Objected to as not the best evidence, hearsay, incompetent and irrelevant. Objection overruled.)”

To this last ruling, no exception was taken. The answer is that, while in strictness the dues were not remitted, the local lodge paid them.

Eliminating what is not excepted to, this is testimony amounting, in effect, to a statement that before the accident the plaintiff was sick. The inquiry as to the allowance of sick benefits and all the rest of it leads up to, is part of, and told the jury of, this previous sickness. It is neither irrelevant, immaterial nor incompetent. Plaintiff exhibited herself before the jury; she testified to physical conditions which she claims resulted from the car accident. Anything was material, relevant and competent which tended to challenge that conditions found existing at the trial were due in whole or in part to the car accident. Any previous illness is relevant to that inquiry. Any admission that involves being sick before this accident, and any inquiry made before that accident as to

whether sick benefits were obtainable, and obtaining same, either prove such illness or tend to.

3.

There is no error point which complains of admitting testimony as to an earlier injury of the plaintiff by a gasoline explosion, but there is a brief point that does. Waiving

whether this is sufficient to entitle the point to consideration here, we have to say that some of this testimony was given by the plaintiff herself on redirect, without objection, and some of it against the objections of the defendant. Appellant can scarcely complain of the reception of this testimony, whatever appellee might have urged, if appealing. Aside from this, the testimony was relevant on whether the physical condition urged as a basis of recovery was wholly due to the act of the defendant, or in whole or in part due to the earlier injury.

4.

A paper known in the record as Exhibit 2½ is an alleged written contract between plaintiff and a lawyer, one Carson, of date June 8, 1907. It contains a statement that Carson is to prosecute an action for damages on account of personal injuries caused by said explosion. The plaintiff, in effect, denied the making of such contract, or the authorizing suit for said injury. Carson was permitted, in effect, to say that the contract was made and the suit authorized. The contract was admitted "for the purpose of going to the fact that a suit of that character in which the question of her physical condition was considered." The rulings permitting plaintiff and Carson thus to testify, and admitting the contract, are without error. When all is said, it appears clearly that this entire examination and the introduction of the

9. APPEAL AND
ERROR: review:
estoppel.

10. WITNESSES:
impeachment:
contradiction:
competency of evi-
dence.

contract went: (1) to contradict and impeach the plaintiff in her statement that she had made no formal claim for, nor instituted a suit to recover, damages for said physical injury; and (2) to show, by way of admission, that, earlier than the car accident, plaintiff had suffered

11. EVIDENCE:
relevancy,
competency
and material-
ity: personal
injury: former
sickness
and injury.

injuries which might account, at least in part, for the condition which she attributed wholly to the negligent acts of this defendant. It was all admissible for that limited purpose, and was admitted for no more than that. More-

over, the petition in the case was offered by plaintiff, with a statement that there was no objection to the part of the petition with reference to her physical condition, and the court ruled that same would be admitted for the sole purpose of showing the physical condition of plaintiff.

5.

Plaintiff offered petitions in which she sought divorce from her husband. Defendant objected, "except to that part which relates to her health," and the court ruled that it

12. APPEAL AND
ERROR: as-
signment of
error: omni-
bus assign-
ments.

would be received for the purpose of "showing the condition of her health and no other."

To this the plaintiff excepted. We fail to see what plaintiff has to complain of. Moreover, we do not find that this is complained of on

this appeal in any way except (1) by the general statement in error point 9 that the court erred "in its rulings excluding plaintiff's evidence upon defendant's objections and in admitting evidence for defendant against plaintiff's objection, specified particularly in the statement of facts and in the argument in support of this claim," (2) by the statement in error point 10 that the court erred in overruling plaintiff's motion for a new trial, and (3) by brief point 9, that sufficient is shown "in support of the foregoing propositions to demonstrate that plaintiff's motion for a new trial should have

been granted." The motion for a new trial deals with the exclusion of evidence in like general terms, and, finally, everything in that motion which is not specifically assigned upon and argued seems to be abandoned by the statement in argument that:

"As the motion for new trial was particularly grounded upon the errors we have hereinbefore argued, argument of errors in overruling it would involve repetition which could hardly be helpful. So far as is applicable, and we believe all of it is, we refer to what has already been said and adopt it as our argument in support of our assignment against the order denying new trial."

IV. Plaintiff was asked what amount she had paid out for medicine or medicines for her use by prescription or advice of doctors since she was injured, and answered: "I cannot say definitely just exactly how much I have paid out, but it has been quite a little sum;"

13. DAMAGES: personal injuries: expenditures. that she bought everything on the calendar that the doctors prescribed to help her; that it has cost her considerable; but that she hadn't exactly made out an itemized bill of it for the 16 months; and that, in her best judgment, not overestimating, "I expect about \$10 or \$15;" and that the money she recalled then as having been paid to a doctor or doctors was \$5 paid Dr. Ely for his examination.

Governing ourselves by the abstract for the appellee, we find that the testimony on medical service and the like, and objections thereto, were as follows: Plaintiff said the "next" doctor she had was Grimes; he never presented his bill and she does not know what it is; knows what the bills of some of the doctors are—Grimes, Vest and Duhigg. Dr. Grimes charged "us" \$2 a visit; she thinks she owes Dr. Grimes \$8. This was stricken out as wholly immaterial "and no foundation laid showing what the amount of the bill was," and plaintiff excepted. She was then asked, "What is your best judgment as to whether Dr. Grimes rendered you a state-

ment," and she answered that she thought it was \$8. Defendant moved to strike this answer, and plaintiff's counsel, in effect, withdrew the question, by the statement, "I don't think you understand my question. Did Dr. Grimes render you a statement for the amount due him?" to which she answered that he did. She continued that she asked Dr. Grimes to come once, and she called at his office about three or four times, and that she knew whether the bill of \$8 which he rendered was a reasonable bill for his services. She was then asked: "Q. Now, you may state whether or not it was a reasonable bill." On the objection of defendant that the question assumed there had been a bill handed to her, that the bill itself would be the best evidence of what it was, and that it is not shown that witness knows the usual charge of physicians in this city, whether it is reasonable or unreasonable, the court said: "I hardly think this witness to be qualified to answer as to the reasonableness of this bill." The plaintiff excepted, but added, "We will withdraw that for the present; there is another way of getting that here." The witness then continued that Dr. Carpenter made seven visits at her home to see her; that she visited Dr. Duhigg's office approximately five or six times; that the latter called at her home once; that he has rendered her a statement; that she has never paid him; and that she knows what the amount of the statement was; and she changed her testimony as to the calls at Grimes' office from about three or four times to four or five times.

We find no error point nor brief point complaining of the rulings on taking evidence as to outlays for medical services, but do find an assignment that the court erred in instructing that nothing could be allowed "for any

14. APPEAL AND
ERROR: REVER-
sal: trifling
deficiency in
verdict.

expense incurred for physicians or nurses or expenditures of any kind," which is credited to Instruction 16, but is found in Instruction

15. We are of opinion that, as we must hold that there was no error in taking this testimony, no instruction was warranted allowing a recovery for such expense.

There is certainly no evidence to justify an allowance for "expenses incurred for nurses or expenditures of any kind," and the evidence fails to show that there was "any expense incurred for physicians." Certainly there is none as to how much was expended or justly and reasonably due, except the item of \$5 paid Dr. Ely. We should not reverse in order that this trifling sum might be allowed, if there were evidence that it was a reasonable expenditure; and there is no such evidence.

In *Elzig v. Bales*, 135 Iowa 208, 215, we held it was error to allow recovery for part of the amount paid out for medicines, without any showing that these were prescribed by physicians or necessary, or that the amount paid was the reasonable value thereof.

2.

It is urged that a married woman engaged in an occupation on her own account has a right of action for tort resulting in injury to her business or to her earning capacity, and that, therefore, it was error to exclude certain evidence, and to charge that nothing should be allowed for loss of time, services or inability to perform labor or earn money. The statement of law is sound, but the record discloses that such law was not disobeyed, and that there is no error available to appellant. There is no evidence which even attempts to segregate the personal earnings of plaintiff in keeping boarders, or her loss of earnings as a detective. There is no way of knowing how much she lost on these accounts, separated from other claims of loss. See *In re Trusteeship of Clark*, 174 Iowa 449. There is no attempt to show any loss of earnings as a detective, either separately or mingled with other items.

15. HUSBAND AND WIFE : wife's separate business : loss of time, etc. : definiteness required.

Plaintiff testified that prior to this injury she had the

occupation or business of keeping boarders at her home; that she just gave them table board because she didn't have a very

large house; that after the injury she continued to keep and provide for those boarders personally and herself, and for five months, but with the assistance of help. On objection

16. DAMAGES:
profits: recovery: keeping boarding house.

to the question as to what help she had hired to do work which she had done theretofore herself, the court indicated that this was not a proper measure of damages, although he would let counsel proceed. Counsel responded that he was anxious to get a suggestion if he could, and then excepted to this "ruling of the court." The witness then continued that at the time she was injured she had from two to seven boarders; that before her injury she did all in cooking, serving and otherwise providing for these boarders, except that she had the help of a student in washing dishes; that she did the cooking, buying, mostly waited on the tables, and kept her house in order; and that after her injury she did none of these things, except that she "managed it for the rest of them to know what to do when I was not able to be up, and when I wasn't they came to me to ask." She said that she did not do any of the physical or manual work for about three months, sat around and did what she could sitting down. She stated that she knew what her earning capacity was by the week or by the month "in money that (she) earned in keeping boarders as (she had) stated at the time (she was) injured." She was then asked to say if she knew what her "average weekly earnings from the keeping of boarders that (she) kept was (per week) up to and at the time that (she) received the injuries," and was not permitted to do so. What plaintiff attempted to put in evidence is clearly labeled by the colloquy concerning it. On objection being made to this last question, the court intimated a doubt whether profits of a business could be considered, and asked counsel to state what he considered the measure of damages. The answer was counsel thought "that the amount that the plaintiff made

and saved, if she knows, as the profits from her work and the food that she served her boarders, the net result would be a fair measure of damage for the injury which she sustained by being unable to produce that service." Being then asked what the claim would be if she made no profits, counsel responded that then there would be nothing lost; that would be a matter that they (the jury) could go into; that if there was nothing made, then "of course, we have got nothing to claim." Counsel added that he thought the running of a boarding house is a legitimate business, the same as any other, and, if its proprietor is capable of earning in that way "net over all other expenditures \$50 a week, we ought to have a right to show that just to the same extent" as if that amount were earned by her in a store or any other employment, and that counsel knew of no other way of determining what damage she has sustained. Thereupon, the court said: "That is the thing that is troubling me, is to get away from this theory of capital, etc., which must be involved in this matter. At the present, I will sustain that objection because it don't seem to me that that is the proper measure of damages." And plaintiff excepted.

In this state of the evidence, it could not be error to charge that the verdict should not include compensation for loss of time, or services, or inability to perform labor or earn money. There was no evidence upon which to award such compensation, and, at best, nothing from which the jury could determine how much money had been thus lost. If there be error, it is not in thus charging, but in the rulings that kept the evidence in this condition. On fair consideration, it is, however, clear that plaintiff proffered all the evidence she proposed to put in—some evidence as to profits. She made no attempt to prove the personal labor necessarily used or money expenditures required to carry on this business, nor to prove the ultimate point—how much the gross earnings would exceed the value of the personal service plus the gross expenditures. But the court indicated that such

proof would have been rejected if offered. Consequently, the question is squarely whether it was error not to let possible profits of keeping a boarding house enter into awarding compensation for personal injuries. We believe that, in principle, *Homan v. Franklin County*, 90 Iowa 185, 191, sustains the refusal. In that case, we hold that considering profits has never been extended to injuries to the ability to conduct a farm, and we ground it on the statement that "the profits of a farm depend upon many contingencies other than the personal services of the owner." While the *Homan* case deals with the profits of conducting a farm, and here are involved the profits of conducting a boarding house, any distinction based on such difference in the business would be a distinction without a difference.

3.

Upon decision of a question of pleading and practice depends whether there is not a still more conclusive reason for sustaining what was done as to outlays and as to profits.

17. PLEADING:
prayer: *de-*
ignatio unius
est exclusio
alterius.

An amendment to petition was stricken. It covered both of said items. If striking it was right, and if the original petition which this amendment attempted to aid as to these two items does not cover said items, then there was no claim in pleading for same. We are relieved from determining whether it was error to strike the amendment because plaintiff insists that all its evidence was admissible under the petition without amendment. No disposition of an amendment which works no change in the allegations of the original is assignable error. (*City of Topeka v. Sherwood*, (Kas.) 18 Pac. 933.) Thus we reach whether, on the original petition, plaintiff was entitled to have submitted to the jury "loss of time or services or inability to perform labor, or money, or any expense incurred for physicians or nurses or expenditures of any kind," or loss of profits. The petition specifically

declares that plaintiff was injured in certain muscles and ligaments, sustained injuries to the spinal column, which she cannot fully describe except to say that she experiences much physical pain and suffering, and at times symptoms of paralysis, and that she has suffered almost constant physical pain and severe and annoying mental anguish since she was injured. This is followed with the statement "and all to her great damage in the sum of \$12,000." The prayer is:

"Wherefore, plaintiff prays that she may have and recover judgment against defendant in the amount of \$12,000."

We think it beyond all argument that the claim for damages in this petition is exclusive in the sense that the only thing charged to have caused the damage, and the only thing for which the amount claimed is prayed, are the specific things enumerated as causing the damage, and as being the reason for the prayer. The decision on the point is controlled by the rule of *ejusdem generis*, and of *designatio unius est exclusio alterius*. The demand for relief rests upon distinctly enumerated things, and it excludes all others.

V. Complaint of Instruction 6 and of No. 8 are related. No. 6 is said to charge, and erroneously, that the duty to plaintiff was such degree of care and foresight to prevent

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|---|--|
| 18. CARRIERS: carriage of passengers: negligence: instructions. | injury as was practical in the operation of defendant's street car system. Such effect can be given the instruction only by segregating one phrase which it uses. Fairly construed, it does not make the mere convenience of defendant a vital consideration. It is: (1) That the law imposes upon this defendant an obligation to exercise the highest degree of care to avoid accident and injury to its passengers that is reasonably practicable under the circumstances and conditions existing at the time and place in question, and consistent with the proper and practical management of its affairs; (2) that this does not mean that the defendant is an insurer |
|---|--|

against accident or an insurer of absolute safety, "but simply that it is required to use the highest degree of care and foresight reasonably consistent with the practical operation of its street car system, in order to prevent injury to its passengers." Its keynote is that the carrier must use the highest degree of care to avoid accident and injury to passengers. All else is merely explanatory of such duty, and the instruction as a whole is that, though the operators of a street car system do owe passengers the highest degree of care to avoid accident and injury, it is still true, and the passenger must be held to understand, that absolute immunity from accidental injury may be had only by not running the street cars. All possibilities of injuring a passenger from the moving of a street car may be avoided by not permitting him to enter a car, or by keeping the car at a standstill. While this would be, indeed, the highest degree of care to avoid accident and injury to passengers, it is a degree of care that is not required, because its exercise would, as the instruction puts it, not be reasonably consistent with the practical operation of the street car system. We think that this is what the instruction should be held to charge.

2.

It is said that Instruction 8 charges, and erroneously, that defendant could not be found guilty of negligence if the evidence showed that, in the exercise of reasonable care, plaintiff might have entered the car in safety before the accident occurred. It charges that it is the duty of defendant, after a car has come to a standstill, to allow what is, under the circumstances, a reasonable and proper time to enable the passenger, in the exercise of reasonable and ordinary care on his part, to board the car in safety before starting it; that, if the car was started in an

19. CARRIERS:
carriage of
passengers:
negligence:
stopping and
starting of
cars: instruc-
tions.

improper manner, and without due warning, and threw the plaintiff on the platform, it would warrant finding that defendant was negligent; but that, if it is shown that plaintiff had a reasonable and proper time, in view of all the circumstances, to enable her, in the exercise of reasonable and ordinary care, to enter the vestibule of the car in safety before the car started, in a careful and prudent manner, the jury would not be warranted in finding that defendant was guilty of the negligence charged. This assignment, too, rests on segregating words to suit the argument; and segregation even does not show error in the instruction. The defendant cannot be guilty of injuring the plaintiff by negligent starting of its car, if it started the same in a prudent and careful manner, and after the plaintiff had had reasonable time to enter the same while it stood still. In effect, it is the theory of this assignment that defendant would be negligent unless it stopped the street car for an hour, if an intending passenger desired that much time to board it, and if, after it starts the car prudently and carefully, and has given the passenger every reasonable opportunity to board the same before it starts, such passenger is injured by boarding the car after it has started.

To the criticism of both instructions, the following language in *Markey v. Chicago, M. & St. P. R. Co.*, 171 Iowa 255, 268, is quite applicable:

“But negligence in law is not made out by failure to employ absolute care. The erection of high walls on both sides of a railroad track, and employing effective guards at every crossing, would practically prevent the injuring of trespassers. But the absence of such walls and guards does not establish actionable negligence. And the law of negligence is, for all practical purposes, a set of rules defining how far absolute care may be departed from, without liability. Negligence is not failure to do all possible, but failure to do what ordinary prudence dictates.”

3.

Neither can we agree with the contention of the appellant that these two instructions, 6 and 8, are prejudicial, even if erroneous. Suppose that they did misdirect the jury as to what constituted negligence on the part of the defendant, or constituted contributory negligence committed in improper boarding of the car. To allow plaintiff a single dollar, the jury was compelled to find that the defendant had been negligent, and that the plaintiff had not contributed to her own injury. The alleged error was not prejudicial, because there was a verdict for plaintiff.

20. NEGLIGENCE:
instructions:
erroneous in-
structions:
harmless er-
ror.

4.

As to the argument that misdirecting the jury on what entitled the plaintiff to recover at all had an adverse "psychological" effect on the amount of the verdict, we can but say that, were it sound, it is yet too subtle to become a rule of appellate review. When the court tells the jury that in certain conditions it should allow the plaintiff nothing, and yet it makes an allowance, there seems to be no logical connection between that action and a feeling that because of such action the verdict should be made small. The finding is that the conditions which the charge requires for a recovery exist. Just how so finding has a tendency to reduce the recovery, we are unable to see.

21. TRIAL: in-
structions:
erroneous but
harmless in-
struction:
psychological
effect on ver-
dict.

VI. There is complaint of certain limitations upon recovery beyond the time of the trial for consequences of the injuries sustained. Instruction 13 says that the plaintiff claims in her petition that the injuries complained of by her are permanent, and that she will in the future suffer, permanently, pain therefrom; so that she has the burden of proof on these allegations, and, "unless the

22. DAMAGES:
pain and suf-
fering: future
pain: perma-
nency of in-
juries: in-
structions.

plaintiff has proved by a preponderance of the evidence that the injuries of which she complains are permanent, or that the plaintiff will in the future suffer pain substantially as alleged from the injuries of which she complains, then, and in such event, you are instructed that you cannot allow the plaintiff anything for and on account of the alleged claim of the permanency of the said injuries or the alleged fact that she will suffer, permanently, pain in the future;" and No. 15 adds that, if the injuries sustained by plaintiff are permanent, then there may be added an allowance for any damages "that the plaintiff will be reasonably certain to sustain by reason of pain and suffering in the future, as the direct and proximate result of said injuries." Appellee suggests that damages *should* be allowed where there is permanent future pain and suffering on account of permanent injuries, and that, as no terms of exclusion are used, we have the case of instructions which are correct as far as they go, and that no error can be assigned because they did not go further, because appellant asked no instruction on the point. We think that this is untenable, and that the instructions plainly direct, not merely that a recovery may be had for permanent future pain and suffering due to and for permanent injuries, but that such injuries and pain and suffering may not be compensated unless the one is permanent or the pain caused thereby is. The charge is erroneous. *Fry v. Dubuque & S. W. R. Co.*, 45 Iowa 416, 417; *Achey v. City of Marion*, 126 Iowa 47; *Ankrum v. City of Marshalltown*, 105 Iowa 493. For one thing, it rules that, if injuries received be cured, say, five years after they had been sustained, suffering due to the injuries and endured during these five years could not be recovered for, because it was not caused by permanent injuries.

2.

But the question remains whether this error may be complained of by the appellant. Though we were to disagree with

the claim of appellee that there was not enough evidence to take future suffering to the jury, still if, despite the assumption in the instruction that it does, the petition does not cover time beyond the trial, the error is not available to appellant, unless there was a volunteer issue tried as to suffering within this time. If such future consequences are not within the issues, plaintiff could recover nothing on their account. If that be the record, she got more than was her due. Being entitled to nothing, she has no cause for complaint because the jury was allowed to give her something, but on conditions which were not justified in the case of one who had a right to recover. There can be no undue limitation of the right to recover as to a party who has no right at all. Whether reversal is due depends, then, upon: (1) Whether there was such volunteer issue; (2) whether the petition is what the court assumed it to be.

3.

The parties may try out questions not mooted in the pleadings and create issues distinct from the pleadings by mutual agreement, and, where this occurs, the court cannot be sustained in a charge which is erroneous upon the evidence thus put in, merely because there is no paper issue for such evidence. But, of course, there can be no volunteer issue unless by waiver or otherwise there be that which amounts to a consent to waive formal plea. Such waiver is often created by failure to object to testimony outside of the paper issue. But to this there is the necessary limitation that such failure to object is not such consent, if the evidence put in, while it tends to prove what is not in the pleadings, is also relevant to what is pleaded. The evidence from which the jury might have found that plaintiff would suffer at a time later than the trial also tended to show what injuries she had

23. **APPEAL AND ERROR:** parties entitled to allege error: error on non-issue.

24. **PLEADING:** issue, proof and variance: issue without written plea: waiver.

sustained, and what her suffering had been up to the time of the trial. The plaintiff had the right to put in this evidence. It was so manifestly relevant to the pleadings that it should not have been objected to, and failure to object to it, therefore, affords no reason why its effect should not thereafter be limited to being addressed to the issues made in the pleadings. See *Ankrum v. City*, 105 Iowa, at 496; 31 Cyc. 681; *Achey v. City*, 126 Iowa 47. Rightly construed and limited to its record, *Bruce v. Town of Eldon*, 122 Iowa 92, 93, is not to the contrary.

4.

What of the allegations of the petition? It begins with the statement that, on December 7, 1911, "plaintiff was painfully and, as she believes and so alleges, permanently injured."

The only other allegation relevant to the point in consideration is that plaintiff "was injured in the muscles and ligaments of her left leg, sustained injuries to the spinal column, whose exact nature and character she cannot fully describe, except to say that she experiences much physical pain and suffering, and at times symptoms of paralysis, and that she has suffered almost constant physical pain and severe and annoying mental anguish since she was thus injured." Damages because of permanent injury may be eliminated from consideration. Such are pleaded, but the court did not exclude recovery therefor and charged that they should be compensated if proved. And so of pain and suffering between the injury and the time of trial. Recovery for that was permitted. The inquiry narrows to whether the petition counts on "pain and suffering in the future;" i. e., later than the time of trial.

Where the evidence tends to show that plaintiff has suffered severe pain right up to the time of the trial, and that she had not then yet fully recovered from the injury, future pain and suffering may rightly be submitted. *Bruce v.*

25. PLEADING: issue, proof and variance: personal injury: future pain: sufficiency of pleading.

Town of Eldon, 122 Iowa, at 93. But, according to *Elzig v. Bales*, 135 Iowa, at 214, it is not enough that the future suffering or expenses may be possible or barely probable; it must be shown that suffering in future is reasonably certain. Nothing which must follow if matter pleaded be true need be specially pleaded. *Gronan v. Kukkuck*, 59 Iowa 18, 20; *Ousley v. Hampe*, 128 Iowa 675, 677. So the inquiry narrows still more, and is, since suffering up to the time of trial is allowed for, whether the petition states that from which it must follow that there will be suffering later than the time of the trial. The injury occurred on December 7, 1911. The petition was filed April 25, 1912. Its allegations are in the past and the present tense, and are, therefore, so far as terms go, limited to time up to April 25, 1912. *McCormick v. Blossom*, 40 Iowa 256. The trial was had about the first of March, 1913. In the last analysis, the question is whether declaring, on April 25, 1912, that one then experiences much physical pain and suffering and has suffered almost constant physical pain and severe and annoying mental anguish ever since December preceding, is a statement from which a claim that there will be such suffering for longer than substantially a year thereafter may be naturally deduced. We seem to have no exact precedent to apply. In *Westercamp v. Brooks*, 115 Iowa 159, 162, the plea was stronger, the petition alleging that plaintiff received "serious and permanent injuries; that he will be in the future incapacitated from working or earning wages; that in the treatment of said injuries plaintiff has expended the sum of \$41 for doctor bills, and he will in the future incur additional doctor bills by reason of said injury," and it sought recovery "for doctor bills as aforesaid, and for loss of time as aforesaid, and for his permanent injuries." We held that there was sufficient allegation to justify submitting physical pain and mental anguish suffered and such as plaintiff will suffer in the future by reason of his injuries. 115 Iowa 161. In *Evans v. Elwood*, 123 Iowa 92, 96, we find a petition sufficient for basing submission of future suffering.

But it differs from the petition here in that it avers "that by reason of his injuries he has ever since the assault continually suffered, and still suffers, pain;" the allegation here being "almost constant." In *Shultz v. Griffith*, 103 Iowa 150, 154, the petition is weaker, in that it declares merely that the suffering has continued for a long time, but does not say that it continued to the time of filing petition. The allegation is that "plaintiff became sick, sore and lame, and suffered great bodily and mental pain and anguish, and continued to suffer for a long time thereafter; that plaintiff has suffered great pain and loss, of time, and was put to great expense." We hold that these allegations are all in the past tense, "and do not even inferentially allege or claim damages for future pain or anguish," and that upon this it was error to instruct the jury to consider future pain and anguish in assessing damages, especially since, though plaintiff testified to his condition up to and at the time of the trial, there was no evidence to show, and his physician was not asked, whether the condition would continue and whether the injuries were such as to cause future pain or anguish.

As a first impression, the point is close, but affirmance, rather than reversal, has the benefit of reasonable doubt. Even if this be passed, the doubt does justify resort to surrounding conditions that bear on what the pleader intended. The evidence for the plaintiff was addressed to her plea. It was interpreted by her proof. The jury that heard it and the counterproof awarded \$200 for the injuries and the suffering during some 18 months. The trial judge ruled on motion for new trial that the verdict is justified by the evidence. The suffering for a year and a half, and up to the time of the trial which is adequately compensated by the difference between the amount due for the injuries themselves and \$200 is not suffering of a character which makes it reasonably certain that it will continue long beyond 18 months after injury.

26. PLEADING:
construction:
future pain:
conditions
surrounding
trial and ver-
dict.

VII. What has been said as well disposes of the claim that "the damages awarded are grossly inadequate as matter of law." We cannot say that more should have been allowed.

Migliaccio v. Smith Fuel Co., 151 Iowa 705, 708, does not hold that the damages awarded here are, as matter of law, grossly inadequate. The exact holding is that, where the deceased had an expectancy of over 30 years, was a steady worker, earned \$1.80 a day, an award of less than \$50 was so absurdly inadequate as that there clearly was no abuse of discretion in the trial court's grant of a new trial on this ground alone.

We are unable to see how *Hubbard v. Montgomery County*, 140 Iowa 520, bears on the propriety of admitting evidence as to previous attacks of rheumatism, the contract with Carson and as to getting sick benefits. And *Swanson v. French*, 92 Iowa 695, 699, is authority for no more than that, when testimony has been erroneously admitted, prejudice will be presumed. And *Puth v. Zimbleman*, 99 Iowa 641, merely holds that objection to a letter, stating that same is incompetent and immaterial because it was not binding on defendant, will not permit the objector to insist on appeal that same was erroneously admitted because it was written after intercourse.

The judgment below should stand affirmed.—*Affirmed.*

EVANS, C. J., LADD and GAYNOR, JJ., concur.

A. J. BENSHOOF, Appellee, v. CITY OF IOWA FALLS, Appellant.

MUNICIPAL CORPORATIONS: Public Improvements—Amend-
1, 4 ments to Law—Applicability—Constitutional Law. An amend-
ment to a law governing the making of special assessments for
public improvements will not be construed as applicable to
proceedings already begun under the old law, and under which
proceedings, rights have become fixed, when such construction
would nullify the amendment by working a deprivation of the
jurisdictional rights of the property owner, or by impairing the

contract rights already existing. It follows that such pending proceedings should be continued pursuant to the terms of the original law. So *held* as to an amendment authorizing assessments on *adjacent* property, in addition to *abutting* property, as provided in the original law. (Sec. 792-g, Code Sup., 1913.)

EVANS, C. J., and SALINGER, J., dissent.

STATUTES: Repeal—Effect—Municipal Improvements. The repeal 2 of a statute does not affect any right which has accrued, any duty imposed, or any proceeding commenced under or by virtue of the statute repealed. So *held* on the question whether paving proceedings already begun under a law authorizing assessments on *abutting* property were affected by a subsequent law requiring assessments on both *abutting* and *adjacent* property. (Sec. 48, Par. 1, Code, 1897.)

STATUTES: Construction—Prospective and Retroactive Construc- 3 **tion.** Statutes will be given a prospective, instead of retroactive, effect, in the absence of a clear intent to the contrary. So *held* on the question whether paving proceedings already begun under a law authorizing assessments on *abutting* property were affected by a subsequent law requiring assessments on both *abutting* and *adjacent* property. (Sec. 792-g, Code Sup., 1913.)

MUNICIPAL CORPORATIONS: Public Improvements—Amendments 1, 4 **To Law—Applicability—Constitutional Law.**

MUNICIPAL CORPORATIONS: Special Assessments—Inequitable- 5 **ness—Objections—Sufficiency.** An objection filed with a city council, charging that a proposed assessment is "inequitable" and was made under the "front-foot" rule, is sufficient to put in issue the question whether the assessment is equitable and in proportion to benefits, rather than in proportion to frontage.

MUNICIPAL CORPORATIONS: Special Assessments—Benefits— 6 **Front-Foot Rule—Depth of Lot.** The *depth* of property, as well as frontage, is a consideration which should not be overlooked in arriving at an assessment of benefits. An assessment manifestly based on the "front-foot" rule, and in total disregard of the depth, is, in present case, *held* to be inequitable.

Appeal from Hardin District Court.—R. M. WRIGHT, Judge.

FRIDAY, MARCH 17, 1916.

IN the district court, this was an appeal by the plaintiff from certain special assessments made against his property by the city council of Iowa Falls. The issue was made in

the form of objections by plaintiff, filed with the city council, as provided by statute. These objections were overruled by the city council, and the proposed assessments were levied. On the trial of the appeal in the district court, the objections were sustained, and a decree was entered, setting aside the assessments and ordering a reassessment. From such decree, the city of Iowa Falls has appealed. *Affirmed in part; Reversed in part, and Remanded.*

Boyd Bryson and Maurice O'Connor, for appellant.

E. P. Andrews, for appellee.

DEEMER, J.—I. The primary question in this case is whether the purposed special assessments involved herein should be made under the provisions of Chapter 76 of the Laws of the Thirty-fifth General Assembly,

1. MUNICIPAL
CORPORATIONS:
public improve-
ments: amend-
ments to law:
applicability:
constitutional
law.

or whether the assessments should be made under the previous law, in force when the street improvement proceedings were begun.

The city council made the assessments under the previous provisions of the law. The plaintiff contended for the application of the new statute. This view was adopted by the district court. The new statute is as follows:

“SEC. 1. Whenever, after January 1, 1914, any city or town council, including the councils of cities acting under special charter, levies any special assessment for street improvement as provided by Section 792 of the Code and amendments thereto and supplementary thereof, the same shall be made in accordance with the provisions of Section 792-a of the Supplement to the Code, 1907, and shall be limited to the amount to be assessed against private property, against all lots and parcels of land according to area so as to include one half of the privately owned property between the street improved and the next street whether such privately owned property abut upon said street or not but in no case shall privately owned property situated more than 300 feet

from the street so improved be so assessed. In case of improvement upon an alley, such assessment shall be confined according to area to privately owned property within the block or blocks improved and if not platted into blocks for not more than 150 feet from such improved alley.

"SEC. 2. All acts and parts of acts in conflict herewith are hereby repealed."

The assessment in this case was for street paving, the proceedings having been begun by the passage of a resolution of necessity by the city council of defendant city, on February 14, 1913. Notice was ordered, and, on the same day, the city engineer directed to prepare plans and specifications on the same day, and on March 26, 1913, the street improvement was ordered. On April 11, 1913, the plans and specifications prepared and prescribed by the city engineer were approved, and on the same day, the city clerk was directed to advertise for bids. On May 12, 1913, the bid of the Kaw Paving Company was accepted, and the contract awarded to it; and on the 15th of the same month, a formal contract was entered into between the city and the paving company. This contract was also secured by a bond, signed by proper sureties. By the terms of the contract, time was made the essence thereof, and the work was to be completed to the satisfaction of the city on or before November 1, 1913, the paving company agreeing to pay as liquidated damages the sum of \$50 per day for each and every day the work remained uncompleted and unfinished after that date. Delays incident to strikes or other causes beyond the control of the paving company were excepted. A modification of the contract was made on September 16, 1913; and on November 3, 1913, the paving company asked an extension of time for completing the paving, the reason therefor not appearing in the record. On December 2d, the council granted the paving company an extension from November 1, 1913, to July 1, 1914, provided the bondsmen consented thereto. The sureties consented to this extension on Jan-

uary 19, 1914. The contract covered something like 181½ blocks of paving, and substantially all of it was completed in the year 1913; but two blocks were paved in the year 1914, and this was due to an extension of time asked for by the contractors. On June 4, 1914, the work was finally accepted by the city council, and the engineer was directed to prepare and file a plat and schedule for assessment purposes.

On July 6th, the council passed a resolution making a levy for the improvement, and also passed a resolution authorizing the issuance of city improvement bonds. It also, at the same meeting, directed the city clerk to give notice of the assessments. Notice was given of a hearing on July 31st, and on July 28th, plaintiff herein filed his objections to the proposed assessment against his property. These objections were overruled, and the assessment confirmed. Plaintiff appealed to the district court, and upon that appeal, the assessment was set aside, because not made under the provisions of Chapter 76, Acts of the Thirty-fifth General Assembly, and the court ordered the council to make a new assessment, after giving the proper notice to all parties in interest, under the provisions of the last mentioned act. The appeal is from this last order and decree. In all the resolutions, notices and proceedings, it was stated that the expense of the improvement was to be assessed against the property abutting on the streets improved. The contract with the paving company also provided that it was to accept assessment certificates against abutting property, levied according to benefits, and the assessments were made by the council against abutting property. The trial court was of opinion that the assessment should have been made under Chapter 76, Acts of the Thirty-fifth General Assembly, and this raises the principal issue in the case. This latter act was approved April 19, 1913, but did not go into effect until July 4th of that year, for it had no publication clause; and it will be noticed that the contract for the paving was let and the rights of the parties became fixed not later than May 15, 1913. The work was to have been

completed by November 1, 1913, and it was not done at that time, because of some fault on the part of the contractor, and time was extended by the council at the request of the contractor. Substantially all the pavement was laid prior to January 1, 1914, and practically all the grading and all the curbing was done in the year 1913. It will be observed that the new act provides that assessments shall be levied upon adjacent as well as abutting property, and appellee contends that the trial court was correct in holding that the city council should have made its levy under the new law instead of under the old, which limited assessments to abutting property. As the statutes of this state require notice of the resolution of necessity in order that property owners may object to the improvement or to the character thereof, or to the material of which it is to be constructed, and are entitled to a hearing thereon, this notice is said to be jurisdictional; and if not given, the whole proceedings are invalid and void. *Roche v. City of Dubuque*, 42 Iowa 250; *Bush v. City of Dubuque*, 69 Iowa 233; *Bennett v. City of Emmetsburg*, 138 Iowa 67; *Dunker v. City of Des Moines*, 156 Iowa 292; *Gilcrest v. City of Des Moines*, 157 Iowa 525; *Gallaher v. Garland*, 126 Iowa 206; *Reed v. Cedar Rapids*, 137 Iowa 107; *Shaver v. Turner Improvement Co.*, 155 Iowa 492; *Comstock v. City of Eagle Grove*, 133 Iowa 589; *Hubbell v. Des Moines*, 168 Iowa 418. This much is said to indicate that this court has always held that notice of hearing of the resolution to pave is necessary to obtain jurisdiction. It is true that it has not been held necessary in a constitutional sense, provided, at some stage of the proceedings, and before the assessment is in fact made, the property owner has notice and is given an opportunity to object; but it is true that, under our previous holdings, such notice of the proposed resolution has been held necessary to the validity of the proceedings, and if not given, they are entirely void. Under this rule, there was no authority whatever, prior to the passage of the act of the thirty-fifth general assembly, to levy assessments for paving, curbing or guttering against

adjacent property. Certainly, no authority in any case to do so arises unless all the notices and proceedings so state. The reason for this is that every property owner whose property it is proposed to assess is entitled to a notice and an opportunity to be heard upon the question as to whether the improvement shall be made at all, and if made, the nature and character of the material to be used, and perhaps other matters not necessary to be enumerated. It may be that the legislature might, if it saw fit, by specific legislation legalize assessments levied against adjacent property, provided that, at some stage of the proceedings, notice and an opportunity to be heard is given, although no notice of the resolution was given; but it is clear that the legislature could not in any way, by curative or healing acts, destroy vested rights or change the obligation of contracts. In this case, the contract was let and the improvement entered upon before Chapter 76 of the Acts of the Thirty-fifth General Assembly went into effect; and by the terms of that contract the city undertook to levy assessments against abutting property only, and to deliver certificates of these assessments to the contractors in payment of the expense of the improvement. Doubtless an abutting property owner cannot urge the unconstitutionality of the act on this ground, because he is not affected thereby; but in arriving at the legislative intent in the passage of the new act, it is quite important to consider whether a given construction would render it invalid as to anyone, because it destroys vested rights or interferes with the obligation of contracts; for it is not to be presumed that the legislature intended to pass any act which was and is unconstitutional, provided a different intent may be inferred.

It will be noticed that the legislature did not intend the new act to have immediate and present operation. By the express terms of the statute, its operation was postponed until January 1, 1914, and the repealing clause certainly did not go into effect until the affirmative part of the act became operative. The act is not, in form or substance, a curative one, nor

one apparently to give new powers to city councils in matters of paving improvements already under way. The undoubted purpose of the legislature was to postpone its operation until all street improvements then under way might be disposed of under the laws under which they were instituted, and not to give additional powers of assessment against property not within the district at the time the proceedings were instituted and the districts formed. We say this because it is well known that, in this climate, paving, curbing and guttering operations are concluded before the winter season begins, and it must have been the thought of the legislature that all street improvements of the kind in question begun in the year 1913 would be out of the way and assessments duly levied by January 1, 1914. Had the contractor complied with his agreement and, not for some purpose of his own, asked for an extension of time to complete a very small part of the job, the assessment in this case would have been completed long before January 1, 1914, and the assessment would have been under the old law. It cannot be possible that the legislature intended one kind of assessment if the contractor did his duty and complied with his contract, and another and still different kind if perchance he could induce the city council to grant him extra time to complete a small part of the work which he had obligated himself to perform within a stated period. Surely this was not the legislative thought.

But it is argued that, if the expense of the improvement is not assessed under the new law against both abutting and adjacent property, there can be no assessment at all; for the

2. STATUTES: repeal: effect: municipal improvements.

new law repeals the old, and there is no law under which any assessment may be made. This argument is specious rather than sound.

Courts quite generally hold that, if the contract has been let and the improvement commenced before a change in the law, and the work be suspended until after a change in the law and not completed until some time thereafter, the assessment is to be levied under the old law. *Kirwan*

v. Fisher, 4 Mo. App. 574, 575; *City of Dallas v. Ellison*, (Tex.) 30 S. W. 1128; *Jones v. Board*, 104 Mass. 461; *Hoertz v. Jefferson, etc., Draining Co.*, (Ky.) 84 S. W. 1141; *Houston v. McKenna*, 22 Cal. 550; *City of Cincinnati v. Seasongood*, (Ohio) 21 N. E. 630; *Marion & M. Gravel Road Co. v. McClure*, 66 Ind. 468; *Merchants Nat. Bank v. Escondido Irrigation Dist.*, (Cal.) 77 Pac. 937; *Firth v. Broadhead*, 7 Mo. App. 563; *Goodale v. Fennell*, 27 Ohio St. 426 (22 Am. Rep. 321); *Anderson v. Cortelyou*, (N. J.) 68 Atl. 118; *Haines v. Board*, (N. J.) 62 Atl. 186; *Fanning v. Schammel*, (Calif.) 9 Pac. 427. Moreover, our general statutes provide that "the repeal of a statute does . . . not affect any right which has accrued, any duty imposed . . . or any proceeding commenced, under or by virtue of the statute repealed." Sec. 48, Par. 1, Code, 1897. Of course, there may be changes in remedies and in procedure so as to affect pending proceedings; but subsequent changes cannot be made which will add to the assessment district, destroy the obligation of contracts, or increase the burden of property owners. These propositions are too fundamental to need the citation of additional authorities.

Assuming that the legislature might, after the proceedings had gone so far as to fix the district, let the contracts and commence the work, change the method of assessment so as to authorize a levy on property outside the district and make adjacent property liable, although it was not so before, the intent on its part to do so must clearly appear. *Jones v. Board*, *supra*; *In re Sackett*, 74 N. Y. 95; *Taylor v. Strayer*, (Ind.) 78 N. E. 236; *Wardens & Vestry of Christ Church v. City of Burlington*, 39 Iowa 224; *Leavenworth v. Miller*, 6 Kans. 288; *Tappan v. Board*, (Mass.) 79 N. E. 796; *Starr v. City of Burlington*, 45 Iowa 87; *Yaggy v. Chicago*, (Ill.) 62 N. E. 316. And in the absence of such intent, the statute will be given a prospective instead of a retroactive effect. This is the general rule in the construction of all statutes.

3. STATUTES: construction: prospective and retroactive construction.

We are clearly of opinion that the statute in question is not a curative one; that the legislature did not intend it to apply to proceedings already progressed to the stage of the ones here involved; and that it had in mind assessments in such cases under the old law.

4. MUNICIPAL
CORPORATIONS:
public improve-
ments: amend-
ments to law:
applicability:
constitutional
law.

Any other holding would render the law unconstitutional in so far as it affects the contract between the city and the contractor, and would render property liable which had not been included within the assessment district and could not have been held subject to assessment by the city or the contractor at the time the contract was let. It is said, however, that, as adjacent property owners are entitled to notice and an opportunity to be heard before any assessments are made, and as the trial court in its decree ordered notice given then as by law prescribed, they have no right to complain; because they may, under Secs. 823, Code Supp., 1913, and 824 of the Code, 1897, have their day in court and be heard upon their objections. It is well to ask in this connection what objections are preserved to them by the statute. Surely they will have the same rights as anyone whose property it is proposed to assess. If this be true, then they have the right to challenge any assessment which may be proposed against their property, because no notice was given them of the proposed resolution of necessity, and they never had an opportunity to be heard thereon; and under all our decisions such an objection would be valid, for the reason that this preliminary notice is jurisdictional, and without it, the proceedings are invalid and of no effect. That it was the intent of the legislature to deprive a property owner of this right in the enactment of the statute in question can hardly be conceived. The ultimate effect of it would be to reduce the assessment against those whose property was liable when the contract was let and the improvement begun; to compel the city to raise the deficiency by a general or special levy against all the property of the city; to compel the contractor to accept certificates for smaller

amounts than the city has obligated itself to deliver, and to resort to a law suit or to a special or general levy voluntarily imposed by the city council. Surely no such result was intended, and there is no principle of law which requires any such holding. *Ross v. Board of Supervisors*, 128 Iowa 427, relied upon by appellee, is not in point, as an examination will show. In that case, the statute, before its amendment, provided for notice of the institution of the proceedings, to the owner of the land intersected by or abutting on the drainage ditch. Code Section 1940. The act was held invalid and of no force; at it was proposed to spread the tax upon all other lands in the vicinity without notice to those outside the district. The legislature then passed an act providing for notice to those outside the district whose lands it was proposed to tax, and this statute was held to validate subsequent proceedings against them. They were allowed, however, to file any and all objections, and the board of supervisors was expressly authorized to annul, diminish or increase the assessments. This act was expressly made applicable to all proceedings then pending before the board of supervisors for the location and construction of drains and ditches. The law was expressly made retroactive, and we said it was not unconstitutional when so applied. The decision was also grounded upon the proposition that, on the hearing provided for those whose lands were not abutting on or intersected by the ditch, the board of supervisors might entirely annul the tax, and that the landowner had the right to show cause, if any he had, why his land should not have been included in the drainage district. No such provisions are in the law now before us. And if appellee's contention be correct, notice being given to adjacent property owners, their property is to be assessed for a proportionate amount of the expense, no matter what their showing. Either this, or they may entirely defeat the tax because no preliminary notice was given them, as required by the statute in force when the proceedings were instituted. If the latter course be chosen, then the new statute is useless, except

to relieve abutting property of burdens and cast them upon the general public. This surely was not intended. There is no reason why the assessment should not be made under the old law, and upon that question, appellee is entitled to a hearing before the district court and to have this assessment reviewed with reference to the proper amount of levy against his property.

II. One other question is presented: Was the assessment laid against the property of the plaintiff equitable and according to benefits? This question is pressed upon us by

5. MUNICIPAL
CORPORATIONS:
special assess-
ments: inequit-
ableness: ob-
jections: suffi-
ciency.

the plaintiff in the event that our holding should be adverse to him on the first question considered. The defendant city contends, however, that this question was not made by the objections filed before the city council,

and that the same for that reason cannot be considered.

It is undoubtedly correct that the emphasis of plaintiff's objection before the city council bore upon the plan of assessment which has already been discussed. He did, however, add a paragraph in addition thereto, wherein he charged the proposed assessment against him to be "inequitable" and that it was made under the "front-foot rule." While the objection is not very specific, we think it is sufficient to put in issue the question whether it was equitable and whether it was in proportion to benefits rather than in proportion to frontage. It appears from the evidence that the plaintiff's property was

6. MUNICIPAL
CORPORATIONS:
special assess-
ments: bene-
fits: front-foot
rule: depth of
lot.

unimproved, except that an old blacksmith shop was situated thereon. It had a lateral frontage on Oak Street (the paved street) of 132 feet, and it had a depth, extending east, of 22 feet. It was of the value of \$3,000. The

assessment levied was \$438. Across Washington Street and facing south on Washington Street opposite plaintiff's property was the Farrington property. This abutted also upon Oak Street, with a lateral frontage of 132 feet extending north. This property had a depth extending east of 44 feet. The real estate

without improvement was of the value of \$5,000 or \$6,000. The improvement upon it was of the value of \$8,000. The assessment upon that property was \$422. Across Oak Street to the west from plaintiff's property was the Ellsworth property. It had the same lateral frontage upon Oak Street as that of plaintiff. It had a depth extending west of 66 feet. The real estate without improvements was more valuable per square foot than was the property of plaintiff. This property was assessed at \$411. With two or three exceptions, the plaintiff's property seems to have carried the highest assessment of any property abutting upon the improvement. There is no accounting in this record for these discrepancies, except to assume that the front-foot rule was adopted as the real basis of judgment. Manifestly, the plaintiff's property was assessed at the same figure at which it would have been assessed if it had been 44 or 66 feet deep.

We would not lay great stress upon the fact that the two neighboring properties, which we have herein specified, were actually improved and that that of the plaintiff was not. We think the mere fact of improvement, or the failure to improve, is not the controlling question. Otherwise, one might be heavily assessed because he had constructed his improvements, and another might escape because he had deferred the construction of improvements upon his property until the paving assessments were fixed. We think, however, that suitability for the purpose of present improvement is always an appropriate consideration. And it may be conceded in this case that plaintiff's property was suitable for substantial and valuable present improvements, although it was on the outside limit of the business district of the town. We are clear also that, where property abuts upon an improved street and is thereby rendered assessable for the improvement, the depth to which such property extends is a consideration which ought not to be overlooked. It is a factor in the area of the property, and such area necessarily affects the benefit to be acquired from the street improvement by the abutting property. That

does not mean that benefits are to be assessed according to the square foot. This would be objectionable for the same reason that the front-foot rule is objectionable. But the consideration of frontage is important, and the consideration of depth is likewise important. It is apparent from this record that the question of depth of plaintiff's property was wholly ignored in this assessment. Because of the conclusion of the trial court upon the first question here considered, no occasion was presented for dealing with this question. It was therefore ignored in the decree. We are unable to say from this record what assessment ought to be made against this property. The original plat and schedule are not before us, and certain exhibits which are referred to in the testimony have not been abstracted. We deem it appropriate, therefore, upon a reversal hereon, that the case be remanded to the trial court, with directions to make such assessment as should have been made under the previous statute, with power to the trial court to reopen the case for further evidence, if it be so advised.

In so far, therefore, as the trial court held the assessment to be governed by the new statute, its order is reversed; in so far as it set the assessment aside, the order will be affirmed, on the ground that the assessment is not proportioned according to benefits.—*Affirmed in part and Reversed in part and Remanded.*

LADD, GAYNOR and PRESTON, JJ., concur.

EVANS, C. J., and SALINGER, J., dissent as to Division I of opinion.

WEAVER, J., takes no part.

EVANS, C. J. (Dissenting in part.)—I am unable to concur in the majority view as expressed in the first division of the opinion. The general contention of the appellee plaintiff is that the power of assessment conferred upon the municipal corporation is legislative wholly; that the power thus confer-

red by the legislature may by the same authority be changed or withdrawn at any time; that the municipal corporation itself has no vested rights in the revenue method provided for it; that the taxpayer has no vested right in such methods, provided only that his property shall not be taken or assessed without due process of law, including due notice at some stage of the proceedings before the assessment is laid against his property. This was the holding of the trial court.

Conceding that the question at this point is close and difficult of solution, I think that the holding of the trial court should be sustained.

As to the cases cited in support of the majority view, none of the holdings contravened express provisions of the statute. In the Ohio case cited, a constitutional provision was involved which forbade retroactive legislation. The new statute under consideration herein provides in express terms that it shall apply to "any special assessment for street improvement" to be levied "after January 1, 1914." The majority holding, therefore, necessarily contravenes this express provision of the statute.

We have no constitutional provision forbidding retroactive legislation. True, we will not construe a statute as being retroactive unless its express terms require it. If its express terms do require it, it is beyond our power to ignore it. If such a construction, however, would render the statute unconstitutional, we might then give it construction which would save its validity.

If it be correct, then, that no jurisdiction could be acquired over non-abutting property at this stage of the proceedings, such fact might be a sufficient reason for denying the application of the new statute to the pending proceedings. The notice provided for by Section 810, Code Supp., 1913, is jurisdictional in the sense that, as a *statutory* requirement, it was a limitation upon the power of the municipality. A notice at that particular stage of the proceedings was not required by reason of any *constitutional* provision. It was

necessary, in obedience to the Constitution, to provide for notice to the property owners, at some stage of the proceedings, before the assessment should be levied. Section 823, Code Supp., 1907, makes provision for such a notice which answers every requirement of the Constitution. It was within the power of the *legislature*, therefore, to dispense with the preliminary notice required by Section 810; and such is the effect of the new statute, if it be deemed applicable to the pending proceedings.

Section 823 is as follows:

“After filing the plat and schedule, the council shall give notice by two publications in each of two newspapers published in the city, if there be that number, otherwise in one, and by handbills posted in conspicuous places along the line of such street improvement or sewer, that said plat and schedule are on file in the office of the clerk, and that within twenty days after the first publication all objections thereto, or to the prior proceedings, on account of errors, irregularities or inequalities, must be made in writing and filed with the clerk; and the council, having heard such objections and made the necessary corrections, shall then make the special assessments as shown in said plat and schedule, as corrected and approved.”

The case of *Ross v. Board of Supervisors*, 128 Iowa 427, is quite in point here. That case involved a drainage proceeding. All the preliminary proceedings, including the construction of the drain, had been had under a statute later held to be unconstitutional. The legislature passed a new statute providing for special assessments; and special assessments were levied thereunder for this improvement against persons who had no notice of the preliminary proceedings but did have notice of the proposed special assessment. We quote from the opinion as follows:

“The appellant takes the position that the landowner is entitled to notice and hearing as to the extent of this district, and whether his land shall be included therein and that the

failure to provide for such notice and hearing renders the statute unconstitutional. In our opinion the objection is unsound. The division of a state or lesser municipal territory into districts for the purposes of taxation or public improvement is a legislative matter, and the citizens affected thereby cannot complain because the power is exercised without notice to him. . . . 'It is settled that if provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of property without due process of law.' In the case before us, there is, under the statute, as amended, ample provision for a notice to every landowner, and opportunity given for the hearing of all objections he may have to assert against the validity and justice of the proposed charge upon his property. This, under the law, is all he can rightfully ask."

A similar question was involved in *Arnold v. City of Fort Dodge*, 111 Iowa 152. The plaintiff in that case had no preliminary notice that the cost of guttering and curbing would be assessed against her property. She did, however, receive the notice provided for by Section 823. We said in that case:

"She then had notice and opportunity to be heard before the assessment attached and became a lien upon her property, and this is all the law requires."

The following from the Supreme Court of the United States bears upon the same question:

"The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. . . . If the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what propor-

tion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." *Spencer v. Merchant*, 125 U. S. 345.

Section 2 of the new statute purports to repeal all acts or parts of acts that are inconsistent therewith. It would seem, therefore, that by the express terms of this enactment the requirement of preliminary notice, as provided in Section 810, was dispensed with, so far as new parties were affected by the new legislation. Inasmuch as the notice provided for by Section 823 meets all constitutional requirements, the legislature had constitutional power to dispense with the preliminary notice provided for by Section 810. If it did dispense with such notice as to new parties, the jurisdiction of the municipality is as broad as the legislative permission.

I concur in Division II of the majority opinion.

SALINGER, J., joins in the foregoing dissent.

FRANK L. DODD, Appellee, v. BERNHARD GROOS, Appellant.

CONTRACTS: Proposals and Acceptance—Definiteness of Proposal

- 1 —Options—Vendor and Purchaser. A definite proposition requires an acceptance only to complete a contract.

PRINCIPLE APPLIED: One negotiating for the purchase of land proposed, as one of the terms of purchase, to give "a first mortgage of \$6,000 at 5% for 5 or 10 years optional; that is, pay on any interest pay day \$1,000 or more." The owner responded by saying he would accept if \$100 more was added to the total price. The proposed purchaser validly accepted the last proposition. *Held*, an acceptance only was necessary to constitute a valid contract under which the purchaser had the option to give a mortgage for either 5 or 10 years.

VENDOR AND PURCHASER: Contracts—Construction—Options.

- 2 In case an option exists to do either of two things, he who is under obligation to first act in reference thereto has the election.

PRINCIPLE APPLIED: (See No. 1.)

BROKERS: Authority—Authority to Make Contract—When In-

- 3 ferred. Authority in a real estate broker to attach the name of the principal to an actual contract of sale is a power additional

to and is not to be inferred from authority "to find a purchaser" or "to negotiate the terms of sale"—is a power not to be inferred in the absence of unequivocal expressions to that effect. Correspondence reviewed, and held not to arm the broker with power to enter into a written contract.

BROKERS: Authority—Place of Payment—Furnishing Abstract.

- 4 Authority to actually enter into a contract for the sale of land implies no authority whatever to insert in such contract provisions binding the principal (a) to receive interest on deferred payments at a place not consented to by the principal, or (b) to furnish a merchantable abstract.

PRINCIPAL AND AGENT: Unauthorized Act of Agent—Waiver

- 5 of Unauthorized Provisions—Promptness Required. It is possible that the *unauthorized* parts of a written contract made by an agent in the name of his principal may be waived and relinquished by the other party to the contract and the remaining part enforced, but such waiver and relinquishment *must be promptly made*.

PRINCIPLE APPLIED: A broker entered into a written contract, in the name of his principal, for the sale of the principal's land. Assuming that the broker had authority to sign the principal's name to a contract, yet it appeared that two wholly unauthorized provisions were inserted in the said contract, to wit: (1) that interest payments should be made at a certain place, and (2) that the principal should furnish a merchantable abstract of title. Long after the action for specific performance was commenced, and more than seven months after the contract called for performance, the buyer, for the first time, sought to waive and relinquish all rights under said two provisions. *Held*, too late—that he must then stand or fall on the writing as a whole.

ESTOPPEL: Equitable Estoppel—Failure to Act on Conduct—Ven-

- 6 dor and Purchaser. An estoppel *in pais* arises only when conduct of one party has been acted on by another to the prejudice of such other. So held where the owner of land, in refusing to convey the same in accordance with an alleged contract with his agent, assigned as cause *that his wife was unwilling to sell*, and, before the alleged purchaser had in any manner acted on such reason to his prejudice, further wrote, and assigned as reason for his refusal *that the alleged contract with the agent was wholly unauthorized*.

BROKERS: Authority—Receipt of Purchase Price. Authority of

- 7 a real estate broker to receive any part of the purchase price of land sold arises only in case the broker has authority *to actually convey*. One employed simply to find a purchaser has no such

authority. Therefore, held that when one claiming to have purchased land paid part of the purchase price to a party who was the owner's agent "to find a purchaser" only, he, in legal effect, constituted such person *his own agent* to convey it to the owner.

PLEADING: Matters Specially Pleaded—Principal and Agent—Ratification. Ratification by a principal of the unauthorized act of his agent need not be specially pleaded—may be shown under a general allegation that the act in question was the act of the principal.

Appeal from Humboldt District Court.—D. F. COYLE, Judge.

FRIDAY, MARCH 17, 1916.

ACTION for specific performance of an alleged contract for the sale of land resulted in decree as prayed. The defendant appeals.—*Reversed.*

Healy & Thomas, for appellee.

Maurice O'Connor, for appellant.

LADD, J.—I. The defendant Groos, residing at San Antonio, Tex., owned 80 acres of land near Pioneer. The plaintiff claims to have purchased said land through defendant's agent, J. F. Whittman. In his petition, filed February 20, 1914, he prayed for the specific performance of a written contract, to which Whittman had attached Groos' name by himself as agent. This contract, among other things, exacted the payment of \$6,000 of the purchase price, 10 years after March 1, 1914, with interest payable at Gilmore Exchange Bank, Gilmore City, Iowa, and that plaintiff "furnish an abstract showing good merchantable title on last mentioned date." After the hearing had commenced, and on October 10, 1914, plaintiff filed an amended and substituted petition, alleging that he purchased of defendant the 80 acres for \$9,600 by written contract executed by Whittman in pursuance of authority given him in the correspondence herein-after set out; that a binding agreement was entered into

through the correspondence and oral acceptance of defendant's proposition; and plaintiff paid Whittman \$500 down, according to the terms of the agreement, \$420 of which was sent to Groos, and \$80 of which was retained by Whittman, as commission; that thereupon such agreement was reduced to writing, but some conditions of a printed form were included by oversight, inconsistent with the above arrangement; that "both plaintiff and defendant were mistaken as to both the fact and as to the legal effect of said printed stipulations; and that, if necessary, in order to enforce the actual contract entered into for the purchase and sale of said real estate, said written contract should be reformed by striking therefrom all stipulations and terms which are prejudicial to the rights and interests of the defendant herein, and which are not included in said correspondence." It was further alleged that thereafter defendant repudiated the transaction; that plaintiff is ready, able and willing to perform, but, though requested so to do, defendant had refused. The prayer is for a decree that the written contract be reformed so as to conform to the agreement through correspondence, and as so reformed, be enforced. The answer and reply were such as to present the following issues: (1) Was the proposition made by plaintiff through Whittman one which exacted only an acceptance to complete a contract? (2) Was the agent, Whittman, authorized to enter into the written contract for defendant with purchaser? (3) If so, can plaintiff, by waiving conditions of the written contract, other than those embodied in the correspondence, insist on the specific performance of the latter, and (4) did defendant, by asserting that his wife would not consent to the sale, waive all other grounds and thereby estop himself from pleading other grounds in defense? Another issue is involved, though not specially pleaded: (5) Whether defendant, in mailing the check and drafts back to Whittman instead of Dodd, ratified the written contract.

II. The decision of these issues necessarily depends on the evidence adduced. On July 23, 1913, J. F. Whittman

wrote Groos that a man from the east had offered \$100 per acre for his land, and that he thought "we can coax him to about one hundred five," and requested to be informed if his land was for sale soon, as the man would go back, and stated that his commission would be \$1.00 per acre. Groos responded that he did not know the value of the land, but would sell it, and asked Whittman to make him an offer. Whittman responded by saying that the improvements were poor; that the land was not tiled and might be assessed for ditch to be excavated north of it; that he might coax the customer to \$110, and asked for price and terms, again named his commission, and promised to do all he could for him, and enclosed a circular with prices on several farms. Groos acknowledged receipt of this, stated that the land was part tiled; that he could not take less than \$120 per acre; that he was willing to pay the commission and, though he preferred cash, would take a mortgage at 5%, adding, "The terms depend sometimes a great deal on the buyer." In response to this, Whittman wrote, on August 13, 1913:

"I have an offer on it \$9,500. The party will give \$500 now to bind contract, and \$3,000, March 1, 1914, and a first mortgage of \$6,000 at 5% for 5 or 10 years optional. That is, pay on any interest pay day \$1,000 or more. Now then, if you want to sell on these terms, let me know at once, as this party is going to buy soon."

He advised that the deal was a good one, and requested that if he would not do this, he state his best terms, and added that "Mr. Dodd of Humboldt is the party who wants to buy." Groos answered, August 16th, saying:

"The terms as offered are not the most suitable, but I will agree to accept the terms as suggested in your letter, providing the party will pay \$9,600 for the place, or \$120 per acre."

Whittman exhibited this letter to Dodd, who said to him, "I will take the farm today;" and handed him \$50 in currency, with the understanding that, as soon as Whittman got

the contract for him, he would tender the balance. Thereupon, Whittman wrote, on August 19th:

"Your letter of August 16th recd., and I 'phoned my man at once. He will take the place at \$9,600, \$120 per acre, terms as per my letter of August 13th. Will send you check and contract as soon as we can have same drawn up. I will enclose herewith check \$50, to bind contract for the man, as he asked me to do this. Contract will follow, also ck less my commission, which is \$80, \$1.00 per acre."

Whittman testified that he employed Van Alstine to draw a contract; that it was signed in duplicate on the same day, when Dodd handed him an additional \$450 in currency. The contract bears date August 19, 1913, but was acknowledged by Whittman August 23d following, was mailed to Groos August 27th, and recorded September 2d. On August 27th, Whittman wrote:

"Enclosed find contract, also draft for three hundred and seventy and 00-100 (\$370.00) for payment as per contract, \$50.00 mailed you August 19th, and enclosed \$370, and receipt for \$80, my commission, which completes the \$500 payment, as per contract."

Groos answered the previous letter, August 29th:

"Your letter of Aug. 19th, with enclosed check of \$50.00 as payment on farm, came to hand. Will herewith enclose same check and return it to you, and will say that my wife will not consent to the selling of our place and never was in favor of it when I first offered it for \$120.00 per acre, she feels that we ought to keep it as it is a safe investment and always brings in a nice income. I am also in receipt of a letter from a law firm and land agency of Humboldt, Iowa, saying that I had offered my place much to cheap. I acted hasty and without first consulting my wife when I first offered the place for sale, it may be that in the future or within a year or to that I can convince my wife that it will be best to sell."

On September 1st, Groos wrote, returning the draft for \$370 and the contract:

"Your communication of Aug. 27th, 1913, with enclosed contract, draft of \$370.00 and receipt of 80.00 came to hand last Saturday. You have no doubt received by this time my former letter with returned check of \$50.00 and informing you that I desire to reject the entire matter pertaining to the selling of my land and also stated the reasons. The part of the contract which reads that a mortgage will be given on March 1st, 1914, in the sum of \$6000.00, drawing interest at 5% per annum and maturing on March 1st, 1924, that part is objectionable; it is to long a time to accept a mortgage at such small interest for so many years, it should have been 6% for such a long time as ten years, and then \$120.00 per acre would be selling the place about \$10.00 per acre to cheap. It is not necessary for me to say more now in regard to this matter, as I stated my other reasons for not wanting to sell, in my former letter."

Whittman responded, September 3d:

"Enclosed find draft for \$50.00 in place of check mailed you on August 19th, which you returned August 29. Now then, Mr. Groos, I sold your land according to your written instructions and sent you the payment down, less my \$1.00 per acre. I made a written contract of sale and same is recorded. You cannot sell to anybody else. If you repudiate your contract, the buyer will at once begin suit for a deed, and if you fail to deed, the clerk of the court will make a deed. If your wife refuses to sign, one third of purchase price will be held by the clerk until she does."

Groos' final letter, of September 10, 1913, reads:

"Replying to your favor of September 3d, I herewith return draft unaccepted. I find that my place is worth more, and that I can secure more for it than the price you mentioned to me that it was worth. It occurs to me that you did not act fair toward me in representing same to be of the value you did; as you well knew or had means of knowing

that it was worth at least \$8.00 or \$10.00 per acre more. Further, I did not authorize you to make any contract with the buyer or to sign my name thereto; and I repudiate any such contract. The terms you made for me are not acceptable to me, as I would want at least one-half cash if I sold to anybody. From what I learn about land values from adjoining property owners to mine, you know that my property is worth considerably more; and I have had better offers since hearing from you. But I am not disposed to sell at this time.

"But, to show I am fair to you for your efforts, without admitting or adopting any act you have made, I am willing to give to you the sum of \$80.00 for your services in trying to secure a purchaser for the land. The price you suggested is unfair and unreasonable; and if I sold the land, I would want what was fair and right."

At Dodd's instance, Whittman addressed Groos on February 3, 1914, as follows:

"Mr. Dodd ask me to write you in regard 'Abstract;' he would like that you send same to bank here that he can have same examined, as contract calls for settlement Mar. 1st, 1914. And Mr. Dodd ask me deliver the land he bought, so I guess it will be up to you to deliver the goods.

"Kindly let me hear from you."

III. It will be noticed as part of the terms proposed in Whittman's letter of August 13th that the

1. **CONTRACTS:**
proposal and
acceptance:
definiteness of
proposal: op-
tions: vendor
and purchaser.

deferred payment was to be "a first mortgage of \$6,000 at 5% for 5 or 10 years optional." Groos responded by saying that the terms were satisfactory if he were paid an additional \$100 for the land. Would an acceptance of this complete the contract, or were further negotiations as to the time of the maturity of the mortgage required to complete the contract? This necessarily depends on whether such time, 5 or 10 years after March 1, 1914, was optional with the purchaser or seller.

The matter involved something to be done by the pur-

chaser. The agent was stating what he would do, and after having done so, he added, "Now if you want to sell on these terms let me know." He then understood that he was stating definite terms, and the seller so treated the proposition; for he expressed his readiness to accept "the terms as suggested," provided the purchase price be increased \$100. The purchaser merely reserved to himself the right to elect whether the deferred payment to be secured by first mortgage should be made in 5 or 10 years from date. The proposition was sufficiently definite so that acceptance acceded to such an election, and with such proposition, would constitute a contract.

2. VENDOR AND
PURCHASER:
contract: con-
struction: op-
tions.

IV. The purchaser, Dodd, testified that the written contract was the only one he understood he had with plaintiff; and in both the original and the amended and substituted petition, the prayer is for the enforcement of that contract. A question of vital importance, then, is whether Whittman was authorized to execute the written contract by signing Groos' name thereto. If any authority there was, it must be inferred from the correspondence between them. This necessarily depends on the intention of the owner in engaging the agent; whether the latter was actually to sell the land or merely find a purchaser therefor. In the first two letters, Whittman pretended to have a customer (of whom he knew nothing at the trial) whom he might coax to pay \$105 per acre (first letter) or \$110 per acre (second letter), and he mentioned the commission he would require. In answer to the last, Groos stated his lowest price and indicated that he would give time on part of it. Whittman then wrote that Dodd had offered \$9,500, and stated the terms of the offer. Groos replied that, on the payment of \$100 more, he would agree to accept. Dodd said he would take the land and paid the earnest money exacted. Nothing was said concerning a sale of the land by Whittman, and the

3. BROKERS: au-
thority: au-
thority to make
contract: when
inferred.

only inference to be drawn from the correspondence is that he was negotiating with a possible purchaser and would exact a commission if he found one on terms acceptable to Groos. Ordinarily, a real estate agent's only duty is to find a purchaser ready, able and willing to buy on the owner's terms or such as are acceptable to him; and he is not to be held to have authority to sell unless this is to be inferred from unequivocal expressions to that effect. Even where the words "for sale" or "sell" are used in connection with the employment of a real estate broker, the agency is not necessarily to be construed as that to sell; but the circumstances may be such that finding a purchaser to whom the principal may sell is intended. *Ford v. Easley*, 88 Iowa 603; *Bird v. Phillips*, 115 Iowa 703. A real estate agent may be given authority to execute a contract for his principal; but it is an additional power, not to be inferred from that to find a purchaser or to negotiate the terms of sale. *Holmes v. Redhead*, 104 Iowa 399; *Nelson v. Western Union Tel. Co.*, 162 Iowa 50; *Balkema v. Searle*, 116 Iowa 374; *Brandrup v. Britten*, 11 N. Dak. 376 (92 N. W. 453); *Larson v. O'Hara*, 98 Minn. 71 (8 Am. & Eng. Ann. Cas. 849 and cases in note).

The decisions are quite generally to the effect that a written contract for the sale of land which the agent has signed on the parol authority of his principal is not within the statute of frauds, and may be enforced. *Brandon v. Pritchett*, 126 Ga. 286 (7 Am. & Eng. Ann. Cas. 1093, and note in which cases are collected). For this reason, such authority is not to be implied unless necessary to enable the agent to perform the service he has been employed to render. For this reason, the weight of authority seems to deny the right of an agent employed to sell to enter into a written contract with the purchaser, on the ground that many matters which the owner must determine necessarily are involved in making such an agreement. *Halsey v. Monteiro*, 92 Va. 581 (24 S. E. 258); *Larson v. O'Hara*, *supra*. *Contra*, *Vanada's Heirs v. Hopkins' Admr.*, (Ky.) 19 Am. Dec. 92.

It is unnecessary to pass on this question now; for what was said in the letters cannot be tortured into the direction to the agent to enter into a contract of sale. He was the "go-between," negotiating between the parties to get them together on terms. He acted without authority in attaching Groos' name to the written contract. See *Weatherhead v. Ettinger*, (Ohio) 17 L. R. A. (N. S.) 210, and extended note. The decision in *Hopwood v. Corbin*, 63 Iowa 218, is not in conflict with this conclusion, for there the correspondence was construed to direct the agent to sell the land.

V. Some of the conditions in the contract were in excess of Whittman's authority, even if he had had the right to attach his principal's name thereto. He could only insert conditions proposed and accepted, in any event. Nothing had been said of the place of paying the interest, or of furnishing the abstract. The contract stipulated that the interest should be paid at Gilmore City, and that Groos should furnish a merchantable abstract. These conditions were in excess of authority. *Knox v. McMurray*, 159 Iowa 171; *Hunt v. Tuttle*, 133 Iowa 647; *Anderson v. Howard*, 173 Iowa 4.

Whether they might have been waived if this had been done in apt time, as before performance was required, need not be determined; for plaintiff demanded an abstract shortly before, and did not change his attitude until seven months after, March 1, 1914, when, according to both the contract and correspondence, the deal was to be consummated. The attempted waiver came too late.

VI. We do not understand appellant to rely on the allegation that defendant is estopped from setting up other grounds for not performing the contract, by writing that he would not sell because of his wife's refusal to consent thereto. Plaintiff did not act in reliance thereon in any manner to his prejudice prior to the receipt of other

4. BROKER: authority: place of payment: furnishing abstract.

5. PRINCIPAL AND AGENT: unauthorized act of agent: waiver of unauthorized provisions: promptness required.

6. ESTOPPEL: equitable estoppel: failure to act on conduct: vendor and purchaser.

letters reciting other grounds of refusal, and among them that the written contract was without his authority. Therefore, plea is without support.

VII. Groos returned to Whittman the check of \$50, sent to him by Whittman, and also the draft of the same amount sent in its stead, and the draft of \$370. Counsel for appellee contend that he should have returned them to plaintiff instead, and that in not doing so he is deemed to have retained them, and thereby to have ratified the written contract of sale. This is on the theory that Whittman was authorized to receive in behalf of defendant the first payment, and that, in returning the check and drafts to Whittman, he was sending them to his own agent, and in law must be held to retain them still.

If this were true, such retention must have been deemed ratification of the contract; for, contrary to appellant's suggestion, ratification may be relied on without pleading it. The ratification of an unauthorized act of an agent relates back to its inception, and may be alleged as the act of the principal. *Long v. Osborn*, 91 Iowa 160; *Smith v. Des Moines Nat'l Bank*, 107 Iowa 620; *Lull v. Anamosa Nat'l Bank*, 110 Iowa 537. The defect in this reasoning lies in the assumed premise, i. e., that Whittman received the money as Groos's agent. The law is well settled that an agent merely to find a purchaser for land is not authorized to receive payment therefor, not even that which is to be paid down. *Mechem on Agency*, Section 797; *Halsell v. Renfrow*, 14 Okla. 674 (202 U. S. 287). The farthest any case has gone has been to say that authority to contract for the sale of land will authorize the agent to receive so much of the purchase money as is to be paid down, this being regarded as an incident of the power to sell. *Alexander v. Jones*, 64 Iowa 207. This was not an accurate statement of

7. **BROKERS:** authority: receipt of purchase price.

8. **PLEADING:** matters specially pleaded: principal and agent: ratification.

the law though the cause was rightly decided; for the conveyance was signed by the principal at a distance and forwarded to the agent to be delivered to the purchaser, so that there was in fact an authority to sell and convey. Authority to convey as well as to sell is quite generally held to be requisite in order to warrant payment to the agent, and the cases cited in *Alexander v. Jones* so hold, or else are not in point. The headnote in *Yerby v. Grigsby*, 9 Leigh (Va.) 387, lends apparent support, but is not in accordance with the opinion, as appears from *Mann's Executors v. Robinson*, 19 W. Va. 49 (42 Am. R. 771). In *Johnson v. McGruder*, 15 Mo. 365, the agent was authorized to sell and loan the money, and the court held that the express power to loan clearly implied the right to receive the purchase price for that purpose. *Goodale v. Wheeler*, 11 N. H. 424, decided that a committee appointed by a town meeting to sell certain real estate at auction might prescribe that a deposit by the purchaser at the time of sale should be forfeited to the town if a sale to him should not be consummated. No deposit was made. Story on Agency, Section 58, states the rule that an agent to sell and convey may receive the cash payment. *Higgins and Gould v. Moore*, 6 Bosw. (N. Y.) 344, and *Hoskins v. Johnson*, 5 Sneed (Tenn.) 469, relate to agencies to sell personal property. The decisions quite uniformly declare that the agent empowered by parol or in writing merely to contract for the sale of land may not receive for his principal the purchase money. *Mann v. Robinson*, *supra*; *Peck v. Harriott*, (Pa.) 9 Am. D. 415; *Dyer v. Duffy*, 39 W. Va. 148 (24 L. R. A. 339); 1 Am. & Eng. Ency. of Law (2d Ed.) 1009; 31 Cyc. 1368; *Smith v. Browne*, 132 N. C. 365 (43 S. E. 915); *Carson v. Smith*, 5 Minn. 78 (77 Am. D. 529); *Shaw v. Williams*, 100 N. C. 272; Mechem on Agency, Section 814.

Of course, if the agent is given the power to sell, the power to do what is essential to effect an enforceable contract of sale is fairly to be implied; and this may be the execution

of a written agreement, or possibly, in this state, a payment of money to bind the bargain. But where the authority is merely to enter into a contract of sale, the power to collect would not seem necessarily to be inferred. In any event, as Whittman was not authorized to sell or to enter into a written contract, he might not receive payment for defendant; and Dodd, in handing the currency to Whittman, must be deemed to have employed him in his behalf to forward the money. This being so, Groos rightly returned the contract as well as the check and drafts to Whittman, and there was no ratification. The court erred in decreeing specific performance. The petition should have been dismissed.—*Reversed.*

EVANS, C. J., GAYNOR and SALINGER, JJ., concur.

JOHN GUNDRAM, Appellant, v. DAILY NEWS PUBLISHING
COMPANY, Appellee.

LIBEL AND SLANDER: Libel Per Se—Ridicule. It is not libelous

- 1 *per se* to publish of one and his wife that they are living on cherries but otherwise starving because of having failed in the chicken business; that he had just mortgaged his chicken farm; that he had not said why he didn't eat chicken; that the wife said she wanted to forget chickens, etc.

LIBEL AND SLANDER: Libels Per Se—Presumptions—Falsity—

- 2 **Malice—Damages.** Libels *per se*—those prohibited by statute—carry, in addition to a presumption of falsity and malice, a presumption of damages; therefore, damages in such a case need not be proved; otherwise, if the libel is not such *per se*.

LIBEL AND SLANDER: Actions—Personal Defamation—Libels of

- 3 **Property or Business—Pleading.** An action for *personal* defamation by reason of an alleged libel does not charge any defamation, slander or libel of plaintiff's business by an allegation that plaintiff was engaged in the restaurant business and that the defamation of his person tended to injure him in his business.

DAMAGES: Speculative Damages—Proximate Cause—Libel and

- 4 **Slander.** Evidence as to certain boarders' having left plaintiff's

restaurant by reason of the alleged libel in question held purely speculative.

Appeal from Pottawattamie District Court.—E. B. WOODRUFF,
Judge.

FRIDAY, MARCH 17, 1916.

ACTION to recover damages for alleged libel. Verdict directed for the defendant below. Plaintiff appeals.—
Affirmed.

Thomas Q. Harrison, for appellant.

Tinley, Mitchell & Pryor, for appellee.

GAYNOR, J.—This is an action to recover damages for an alleged libel, published by the defendant in its newspaper on the evening of June 17, 1914. The article complained of is as follows:

1. LIBEL AND
SLANDER: libel
per se: ridic-
cule.

“Sick o’ Chickens; Live on Cherries.

“Gundrams have Chicken, Chicken Everywhere,

“but Not a Bite to Eat.

“The Farm is Mixed Up.

“Living on cherries, but otherwise starving because they have failed in the chicken farm business is the plight told of by Mr. and Mrs. John Gundram, who have just given a mortgage on their 100-Leghorn farm north of the Bluffs.

“They have not said nor have they been asked why they don’t eat chicken.

“The ranch has nearly 1,000 thoroughbred Leghorn chickens, well housed. John Gundram bought it last year, taking over a \$1,500 mortgage. Mortgage and all was traded to Gus Reading, a Wisconsin man, for some Wisconsin

chicken land and an \$800 further mortgage, a few weeks ago.

"The Gundrams claim there was trouble in recording the mortgage, and that more money had been borrowed on the place.

" 'I wish it could be sold, or something done,' said Mrs. Gundram, Tuesday; 'I want to forget chickens.'

"She says they are starving and eating cherries to keep alive. Attorney George Mayne now has a mortgage on the thousand chickens. They were never counted, says Mrs. Gundram."

It is alleged that the article was published with intent to, and that its publication did, deprive plaintiff of the benefit of public confidence and social intercourse, and subjected him to ridicule and contempt among his friends and acquaintances and the general public, and brought him into public disgrace and scandal among his neighbors, friends, acquaintances and business acquaintances; that the statements made in said article so published were wholly untrue, and were published maliciously. The defendant in his answer practically admits the publication of the article, but denies that the plaintiff was injured as claimed, and alleges that the article was published without malice, and without any intent or purpose of injuring or harming the plaintiff.

Upon the issues thus tendered, the cause was tried to a jury. At the conclusion of plaintiff's testimony, the court instructed the jury, on defendant's motion, to return a verdict for the defendant, which was accordingly done, and judgment thereon entered for the defendant against the plaintiff for costs. From this plaintiff appeals, and complains: (1) That the court erred in directing a verdict for the defendant; (2) that the court erred in excluding certain testimony offered by the plaintiff.

On the first error assigned, it is the contention of the plaintiff that the article published was libelous *per se*, in that it subjected the plaintiff to contempt and ridicule, and tended

to deprive him of the benefits of public confidence and social intercourse.

This brings us to the question whether, upon proof of a publication, without proof of special damages, the plaintiff is entitled to have the case go to the jury, on the theory that the article is libelous *per se*. If the article

2. LIBEL AND
SLANDER: libels
per se: pre-
sumptions:
falsity: mal-
ice: damages.

is libelous *per se*, then, under the authorities, the plaintiff is not required to prove the falsity or malice in its publication. Both are presumed. Nor is he required to make proof of damages, for such a libel is presumed to cause some injury. See *Prewitt v. Wilson*, 128 Iowa 198; *Morse v. Printing Co.*, 124 Iowa 707. Our statute provides:

"A libel is the malicious defamation of a person, made public by any printing, writing, . . . tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse." Sec. 5086, Code, 1897.

This code definition has been held applicable to civil actions to recover damages for libel. See *Stewart v. Pierce*, 93 Iowa 136.

Any publication inhibited by this statute is libelous *per se*, and no special damages need be alleged or proved. See *Children v. Shinn*, 168 Iowa 531, and cases therein cited.

Whether a publication relied upon is libelous within this statutory definition, and is, therefore, libelous *per se*, is always a question for the court. See *Sheibley v. Ashton*, 130 Iowa 195, and cases therein cited.

A libel at common law and under this statute is the malicious defamation of a person. Defamation is defined by Webster as the taking from another's reputation. Words which produce any appreciable injury to the reputation of another are called defamatory; so when we speak of the defamation of a person, the mind at once reverts to the thought that, in the publication, his reputation among men,

his good repute, has been impaired, injured or destroyed; and when we look to the words written or spoken, the inquiry naturally arises: Would the words spoken or written, in their usual and ordinary meaning and import, convey to the mind an impression of and concerning the man, his habits, life, character and conduct, which tends to lessen him in the esteem and confidence of those to whom a knowledge of the written or spoken words is brought? Do they tend to expose him to public hatred, contempt or ridicule, or do they, if believed, tend to deprive him of the benefits of public confidence and social intercourse? If they do, then they are libelous *per se*, and the plaintiff is entitled to go to the jury upon proof of the publication. One who publishes such an article violates not only the letter but the spirit of the statute. If, in the violation of the statute and its inhibition, he exposes a citizen to public hatred, contempt or ridicule, or deprives him of the benefit of public confidence and social intercourse, he must be held to answer for his act. The libel rests upon the thought that he has committed a public wrong, has done an act in violation of the statute, to the hurt of the complaining citizen. He has violated the right of the citizen to remain secure in his good name and repute among his fellows, and to enjoy their confidence and esteem. A publication that tends to take this from him takes one of the most valuable rights, his right to the confidence, esteem and respect of his fellow men. The thought that underlies all inhibitions of this character is that every man is entitled to enjoy the confidence and esteem of his fellow men. One who, by right living and by right conduct, has built up for himself an enviable name among his fellows, and has drawn to him their confidence and esteem, is entitled to retain and enjoy it, and one who wrongfully and maliciously, and without just cause, makes an assault thereon and impairs or injures the same, does a grievous wrong, for which he is answerable in damages.

We are dealing now with libel of the person, and what we have to say has no relation to libel or slanders of property

or business. These have their proper place in the law, and are entitled to protection under law. The

3. LIBEL AND
SLANDER: ac-
tions: personal
defamation:
libels of prop-
erty or busi-
ness: pleading.

plaintiff's claim here rests on personal defamation. It is true that, in his petition, he alleges that he was engaged in a restaurant business, and that this defamation of his per-

son tended to injure him in his business, but this does not charge any defamation, slander or libel of the business. Nor in the article itself is there any invidious statement touching plaintiff's business, its character or the conduct of it. These charges as to injury to his business are simply alleged as elements of damage growing out of the personal libel, and cannot be considered as distinctive charges of a libelous publication touching the plaintiff's property, business or trade.

The only witness called was the plaintiff in the suit, and his testimony discloses the following facts: That on June 17, 1914, he lived in the city of Council Bluffs; that he never

4. DAMAGES:
speculative
damages: prox-
imate cause:
libel and slan-
der.

made to anyone the statements set out in the published article, and never authorized anyone to make the statements; that, before the 17th day of May, he had been employed as a cook for Metzger & Co.; that he was run-

ning a restaurant at the K. C. House on June 17, 1914; that he had been running that business there for 3 or 4 days before that time. He was asked this question:

"How many patrons did you have in the restaurant on the 17th of June, customers in that restaurant down there, or just before the article was published? A. Well, we had quite a number. Q. Could you give an approximate idea of the number? A. About close to 100. A great many of my customers quit me. After the publication of the article, some of them quit dealing with me. I don't know how many, but dropped off of me. None of these patrons came back to me after that time."

He was asked this question:

"How much of the business did you have down there on and prior to the 17th day of June in the restaurant? A. I had a pretty good business. Q. Now tell the jury what, after this article was published, was the condition of your business, and whether you lost any, or what the effect was in regard to that. A. Lost considerable of it. I don't know how many dropped off on me. I lost a dozen in 3 or 4 days. I gave up the restaurant business about three weeks after the 17th of June. I was unable to conduct and operate and maintain my business after the boarders dropped off."

He further testified:

"My attention was called to the article right away after it was printed, the same evening. I was ashamed of myself, that was all; felt like a man with his neck cut off. It broke my heart all to pieces."

This is all the testimony introduced on the trial, and all the competent testimony offered. There is no causal connection shown between the publication of this article and the fact that certain of the plaintiff's boarders left his restaurant after that time. None of these boarders were called. It does not appear whether those who left were regular boarders or transients. There is nothing in the article itself that even suggests a connection between the two. To permit the jury to say that the publication of the article was the proximate cause of these boarders' leaving, and predicate damages upon that finding, would be to turn them loose in the field of speculation without any tangible basis upon which to speculate. See *German Savings Bank v. Fritz*, 135 Iowa 44.

There is no other evidence offered which the plaintiff, even in argument, contends tended to sustain any of the allegations of his complaint touching damages. In fact, there was no other evidence of any damage to the plaintiff offered, other than that which rested upon the mere speculation arising out of the suggested relationship between the article and the departure of plaintiff's boarders. Unless the article is actionable *per se*, the plaintiff, before he can recover, must

allege and prove special damages resulting as a proximate result of the publication. Unless, therefore, the article is actionable *per se*, the court clearly, under this record, was justified in directing a verdict for the defendant.

We have made a careful study of this article, and have concluded, under the rule recognized in *Hollenbeck v. Hall*, 103 Iowa 214, that none of the inhibitions of the statute were violated in this publication. "Such publications may be the subject of just criticism, but its publication does not expose to public hatred, contempt or ridicule, in the sense or to the degree required by the law of libel," and are, therefore, not actionable *per se*. There is nothing in the article as published tending to brand the plaintiff with dishonesty or other conduct or characteristic deserving the contempt and reprobation of right-minded men, or that would in the least tend to alienate his friends, or to "expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse." See *Quinn v. Prudential Ins. Co.*, 116 Iowa 522, and cases collated therein.

The action of the court is therefore—*Affirmed*.

EVANS, C. J., LADD and SALINGER, JJ., concur.

E. R. HANES, Appellee, v. WILLIAM SEE et al., Appellants.

APPEAL AND ERROR: Right of Review—Involuntary Performance of Judgment—Effect—Forcible Entry and Detention. An involuntary performance of a judgment does not waive the right to review on appeal. So held where defendant in forcible entry and detention involuntarily vacated the premises in order to avoid a forcible removal by the constable who was present with an order of removal. (See Sec. 4220, Code, 1897.)

Appeal from Polk District Court.—W. S. AYRES, Judge.

FRIDAY, MARCH 17, 1916.

ACTION of forcible entry and detainer. Question involved

right of defendants to maintain an appeal after surrendering possession of the premises in controversy to the constable, who came armed with a writ of ouster, it appearing that the constable threatened to serve the writ and oust the defendants if they did not remove peaceably. Judgment for the plaintiff in the court below. Defendants appeal.—*Reversed*.

L. A. Smyres and J. E. Holmes, for appellants.

S. B. Allen, for appellee.

GAYNOR, J.—On the 12th day of April, 1912, the plaintiff brought an action of forcible entry and detainer against the defendants in justice court, and in her petition claimed that, on the 20th day of August, she leased to the defendants certain premises containing about 30 acres, for the term of one year, beginning with the 6th day of September, 1910; that plaintiff was, at the time of the making of said lease, and at the time of the commencement of the action, the owner of the leased premises. In said petition, plaintiff further alleged that the defendants had violated the terms of their lease, in that they had not paid rent as provided in the lease, and had not performed other conditions of the lease, and further alleged that defendants had not exercised the option of continuing on said premises after the expiration of the year, as provided in the lease; that, on the 2d day of April, 1912, the plaintiff served a written notice on the defendants to quit and surrender possession of the premises to her; that this they refused to do, and maintained possession in violation of their lease. She prayed therefore that the defendants be removed from the premises, and that she, plaintiff, be put in possession. To plaintiff's petition in justice court, the defendants filed answer, in which they say that they admit that plaintiff served notice to quit as alleged; that they (the defendants) are in possession; but say that they are rightly in possession,

APPEAL AND
ERROR: right of
review: invol-
untary per-
formance of
judgment: ef-
fect: forcible
entry and de-
tention.

because, on the 5th day of September, 1911, and before the expiration of the year provided for in the written lease, they did exercise their option to continue on said premises for a further term of four years, and orally notified plaintiff of the same; and further say that they have had the peaceable and uninterrupted possession, with the knowledge of the plaintiff, for more than 30 days after the alleged cause of action accrued, if it did accrue; and that plaintiff is now estopped and barred from maintaining this action, under Section 4217, Code, 1897. They further say that they are occupying the premises as a farm and cultivating the same as such, and that the notice served upon them to quit was not served to terminate the tenancy on the 1st day of March, as required by Section 2991, Code, 1897. Wherefore, they ask that the plaintiff's petition be dismissed.

Upon the issues thus tendered, the cause was tried in the justice court, and judgment entered for the plaintiff as prayed, and from the judgment so entered, the defendants appeal to the district court. Upon the appeal's coming to the district court, the plaintiff filed a supplemental petition, in which she states that, subsequent to the hearing in the justice court, the defendants settled and compromised and disposed of the case, in that the defendants, by virtue of the terms of their lease, were to take care of certain stock belonging to the plaintiff more particularly shown in the lease, and were to take care of certain stock belonging to themselves, and to divide the proceeds and increase according to the terms of the contract; that the lease provided that, if any difficulty arose, a compromise might be had by arbitration; that, after the decision went against them in the justice court, the defendants voluntarily surrendered all the stock referred to in the lease belonging to the plaintiff, and took their stock and moved it from the premises; that the settlement was verbal and as follows: It was agreed that the defendants were to have the first choice of two calves and seven pigs, and in consideration therefor were to surrender to the plaintiff the

cows and the farming tools and implements belonging to the plaintiff, and used in connection with the premises; that, in pursuance of said agreement, the defendants did select the calves and pigs as aforesaid, and did take them and move them from the premises and left plaintiff's property upon the demised premises, and vacated the premises; that, by so doing, they waived the right to appeal. Plaintiff further says that, since the defendants have vacated the premises and removed the stock, they are not in a position to perform the conditions of their lease, in that they voluntarily divided the stock, chickens, and other property, and, since said time, have disposed of the same, and have placed themselves in such a position that it will be impossible for them to carry out their part of the contract, even if they should succeed in this action and be restored to the property, and therefore that they are not entitled to maintain the appeal. To this supplemental pleading, defendants filed a general denial, and the cause was tried upon these issues in the district court. At the conclusion of all the testimony, both parties moved for a directed verdict.

Plaintiff based his motion on the following grounds:

First. For the reason that, after the case was tried in the justice court below, and after notice of appeal, the case was settled, compromised and disposed of, and the defendants moved out of the place voluntarily, after having accepted the proposition from the plaintiff.

Second. That the evidence is uncontradicted that a proposition was made to the defendants, and that no writ was ever served upon either of the defendants to eject them, and they accepted the proposition to, and did voluntarily, move from the premises in question, after being given two days to secure an adjustment.

Third. That the evidence discloses that the defendants have voluntarily placed themselves in such a position that, if they were awarded the possession of the premises and permitted to go back, they could not now comply with their lease, for the reason that an adjustment and disposition of

the property involved in the lease were such that it became thereafter impossible for them to perform their lease.

Fourth. That the evidence conclusively shows that the defendants have no right to be restored to the possession of the premises.

This motion was sustained, and the court directed a verdict for the plaintiff, and overruled defendants' motion, and entered judgment for the plaintiff, confirming possession of the property in the plaintiff, and assessing the costs made in the trial of said cause against the defendants. From this the defendants appeal.

The only parts of the lease material to the controversy here presented are as follows: The parties are to divide all the produce, consisting of crops, fruit, etc., grown upon the premises, and all the increase in stock, chickens and eggs, equally, except as provided in the lease; the first party to furnish 100 hens and roosters, and the second party, the same number, these to be kept upon the premises. In case of a division of chickens, each party is first entitled to select the original number of fowls placed by him on the place, and an equal division is to be made of what is left; the first party to leave on the premises two cows and two calves that are now there, the milk from the cows to be divided equally; the heifer calf to be kept on the place and the steer calf to be fattened and killed and divided equally; the accumulated stock upon the premises to be divided equally; all original stock placed on the premises by either party to remain his; the increase to be divided equally; all crops raised on the premises to be fed to the stock, but if there is more than sufficient for that purpose, the same is to be sold by the second party, and the proceeds divided equally. There were then certain provisions in the lease requiring the defendants to do certain things involving the care and preservation of the premises. It was further stipulated and agreed that, if the lessees failed to pay rent at the time stipulated, or make default in any of the covenants, they forfeited all their rights under the lease, and

the lessor could recover possession by action of forcible entry and detainer. It was further provided that the lease was to commence on the 6th day of September, 1910, and continue for one year, and the second party was to have the option of continuing on the premises for four years thereafter, provided that they had previously acted in conformity with the terms of the lease. Under this lease, the defendants took possession, and there is no showing that all the terms of the lease were not complied with by the plaintiff as to furnishing stock, chickens, etc. The defendants continued in possession during the first year as provided in the lease, and we must assume—because there is a controversy as to this fact—that defendants elected to avail themselves of their option to continue for four years longer.

It is apparent, then, from this record that, at the time that the action was commenced in the justice court, the defendants were in possession of these premises under a lease from the plaintiff, and were rightly there, unless by their conduct they forfeited their right to continue in possession under the terms of the lease, as alleged by plaintiff in her original petition. The grounds on which the plaintiff seeks to avoid the lease and oust the defendants, as alleged in her original petition, are that they, while in possession under the lease, have violated the terms of the lease, in that they have not paid the rent as provided in the lease, and have not performed the conditions of the lease.

When the case reached the district court on appeal, the cause was there tried and disposed of upon the allegations of the supplemental petition, and this petition presents the claim that, subsequent to the trial in the justice court, the defendants had settled and compromised the controversy involved in the suit, and had voluntarily divided the property on the premises and surrendered the possession of the premises to the plaintiff. It is claimed that there was a consideration for this settlement, in that the defendants were given a *first choice* in the division of the property, which right they did not

possess under the lease. The record discloses that, after the trial in the justice court, and after judgment had been entered for the plaintiff, an execution was issued for the removal of the defendants from the premises; that this execution was delivered to one Oley Landey, a constable in and for that township, for service; that this writ or execution so issued was in the following form:

“TO THE CONSTABLE OF SAID COUNTY—GREETING: WHEREAS judgment in favor of E. R. Hanes and against Wm. See & Sina See that the said Wm. See & Sina See be removed from the premises as follows, to wit: N. E. 30 acres of the S. W. $\frac{1}{4}$ of Section 33, Twp. 80, Range 24, Crocker Twp., Polk County, Iowa, and that the said Wm. See & Sina See be out in possession thereof and for \$32 costs of suit was recovered on the 14th day of March, A. D. 1912, before me, L. D. Winehart, a justice of the peace for the township of Crocker, county and state aforesaid. These are therefore in the name of the state of Iowa, to command you that forthwith you remove said Wm. See & Sina See in possession thereof, and that of the goods and chattels of the said Wm. See & Sina See (except such as the law exempts) you cause to be made the said costs by distress and sale thereof according to law, and of this writ make legal service and due return of this writ at my office in said township within thirty days of this date.”

With this writ in his possession, this constable went to the premises occupied by the defendants and notified them that he had the writ in his possession. The husband of the defendant testifies, touching what occurred after Landey reached there with the execution in his possession, as follows:

“He came to my place early in the morning. He came with a spring wagon, and a team. He said that Hanes made him a proposition to fetch to me, and I said, ‘On what terms, and what kind of a proposition did he send?’ ‘Oh,’ he says, ‘he has agreed to go ahead and divide the hogs and calves and he sent me down to see if I could get a division,’ and I says, ‘I have no right to make a division with him of the stock here.

I have an interest in all the stock.' He told me, he says, 'You could go to work and have your choice of the pigs, and have four or three. You could have the four smallest, or the three largest ones in the division of the pigs, and also you could have your first choice out of the calves, and if you don't take those I'll have to move you out into the woods, or out into the big road.' He fetched his team for that purpose. He told me if I did not accept the proposition he had a man hired who was going to take all the stock and he had Charley Harvey hired to come down to help get the hogs and drive the cattle out. Q. That was upon the condition that you did not accept his proposition? A. Yes, sir. That is what he told me. Q. What was said in reference to your moving, or when you could move? A. There was no limit to it. If I took the division of the stock that he would give me until the next morning to get out of there. I had to get out. Q. He told you, you had to get out? A. Yes, sir. Q. Whether you divided or not? A. Yes, sir. Q. The fact remains that you did divide up the property as Landey suggested before he left? A. I had to do that or lose it. Q. He did not serve you with a writ of ejection, that is true? A. I don't remember of it now, as far as that is concerned, I would think though I would have to move when an officer told me I would have to get out. Q. You did that in compliance with the understanding? A. I did it in compliance with the law, as he said, they were going to move me out in the big road. Q. State whether or not there was ever a settlement between you and Hanes other than you have testified to about the division of the stock. A. No, sir. Q. Nothing? A. No, sir, there never was such a thing mentioned."

Landey testified that, before he went to serve the writ, Mr. Hanes asked him to take a proposition to the defendants to divide the property, and get off the place; that he carried this proposition to the defendants; that the proposition was as follows: To go to See and divide the property; that is,

he had two calves and one was larger than the other, and just divide them, but he could have his choice of the two provided he would move off the place; that he carried this proposition to See, and that See agreed to do this and divided up, and afterward moved off; that he accepted the proposition Mr. Hanes sent to him, took his choice of the stock and moved off. This witness further testifies:

"I had the writ in my pocket. I told See that Hanes told me to tell him that I came out there to divide the stock, and that Hanes would rather have him move off peaceably than to put him off, and I was authorized to divide the stock up and he was to take his first choice out of it, and we did so."

Hanes testifies that See vacated the premises; that he took and sold his share of the property on the place, and left the landlord's share on the place.

Mrs. See says that she was present at the time that Landey, the constable, was there, and she testifies as follows:

"Mr. See asked him what his proposition was, and he told us that we were to have so many of the pigs, and one of the calves. We were to take our choice of the calves. There were seven pigs, and one had to take three, and the other four, and Mr. Landey (the constable) was to pick the pigs which was to be the four smallest, and which was to be the three biggest. That was left to Mr. Landey, and Mr. See says, 'Well, what about the rest of the stock. I have an interest in it,' and he says (Landey), 'I have got no authority over this. You are to take this proposition, or I am here with the wagon to move you out.' Well, Mr. See and him wrangled over it a while, and Mr. See said it wasn't the right proposition, and so on. Mr. Landey says, 'My time is precious, I am fooling away my time for nothing, and you will either have to take the proposition or I will have to start to move you.' That was all there was to it, and Mr. See says, 'Of course, I will have to.' Mr. See further said, 'If that is what I have to do, I've got to do it.' He didn't say he wanted to do it or that he was willing

to do it. This was in the spring. We had the corn planted, we had the millet seed bought but not sown. I think there was 14 acres of corn. We had some garden planted also."

This is all the testimony material to the controversy here. The question for our determination is whether or not, under this record, it is shown that the defendants, by their conduct since the entry of judgment in the justice court, have waived the right to prosecute their appeal in the district court.

That a voluntary performance of a judgment waives the right of review on appeal is, as a general proposition, well settled. The apparent conflict in the authorities is due not so much to a failure to recognize the general principle as it is in the application of the principle. The courts differ as to what constitutes a voluntary performance of the judgment so as to preclude the right of review upon appeal. We find it necessary to review somewhat the authorities, before announcing our conclusion as to what the rule is that should be applied to the rights of the parties under the controversy here submitted. In *Borgalthous v. Farmers' & Merchants' Ins. Co.*, 36 Iowa 250, judgment was rendered against the garnishee in favor of the plaintiff for the amount of proceeds of certain notes in his hands. Leedham, the garnishee, appealed from the judgment. A motion to dismiss the appeal was filed on the ground that Leedham had paid the amount of the judgment rendered against him. The court, in disposing of the case, said:

"Neither can the garnishee, Leedham, be heard to deny in this court the correctness of the judgment. By submitting thereto and discharging it by voluntary payment, he waived all errors that may have existed in the record. It would be a practice resulting in hardship, abuse and inconvenience to permit parties to appeal after fully performing the orders and judgments of the court. By the act of payment and performance, they are estopped to deny the sufficiency of the adjudication against them. . . . A performance is certainly an act of assent or waiver of errors, more emphatic and expressive. It has been ruled by this court that a party can-

not accept the benefit of an adjudication, and yet, alleging it to be erroneous, appeal therefrom" (citing authorities). "The obvious reason of this decision is that the party's act estops him from objecting to the judgment, having acquiesced in its performance or discharge by the other party. The same principle will cut off the right of a party defendant, after paying a judgment, to appeal therefrom."

In *Burrows v. Stryker*, 45 Iowa 700, there is involved the question as to whether or not a payment was voluntary. It appears that a special execution was issued for the sale of certain real estate. This was issued at the instance of the plaintiff. The defendant paid the amount of the judgment to the clerk under protest, reserving, so far as he could by such protest, his right to prosecute his appeal which had been taken before the issuance of the execution. This court said:

"The money was paid to prevent a sale of the property under the execution. We do not regard this as a voluntary payment, nor did it in any manner affect the appeal or the right to further maintain it."

Dudman v. Earl, 49 Iowa 37, simply holds that, where the plaintiff succeeds in recovering a portion of his claim and appeals from the action of the court in denying a portion of his claim, and the portion found in his favor is paid into the hands of the clerk and accepted by him, this does not defeat his right to maintain an appeal as to the disputed question, and it was held that he might maintain the action, notwithstanding that he had accepted a portion of the judgment found in his favor.

In *Hintrager v. Mahoney*, 78 Iowa 537, it is said:

"In the district court the amount necessary to redeem fully at that time was ascertained, and, as a condition upon which the decree favorable to defendants was entered, they were to pay the ascertained amount into court for plaintiff within a specified time. From that part of the judgment the defendants appealed. However, within the required time, the amount was paid. The payment was a performance of the

judgment, and from a judgment which had been performed an appeal will not lie."

Sample v. Collins, 81 Iowa 23, involved the right to the possession of land. It appears that, after the decision of the court had been announced in favor of the appellee, and the amount of the supersedeas bond was being considered, it was suggested that the possession of the property should be delivered to the appellee, and that if that were done, the amount of the supersedeas bond would be greatly reduced. Thereupon, the appellant delivered the possession of the land to the appellee, and then a motion was made by appellee to dismiss the appeal on the grounds that appellant had performed the judgment, and had surrendered possession to him. The court said:

"It was simply a compromise by which to lessen the amount of the *supersedeas* bond. . . . The real estate which is the most important feature of the contention is still subject to the final decree that may be entered," and the motion was dismissed.

It was held that this was not a voluntary performance of the judgment to such an extent as to defeat the right of review in the appellate court.

In *Gilbert v. Adams*, 99 Iowa 519, a motion to dismiss the appeal was filed because the appellant had recognized the validity of the judgment, and had paid a portion thereof. It appears in this case that no supersedeas bond was filed. An execution was issued and levied upon a large amount of personal property, and the property advertised for sale. Shortly before the sale, the parties entered into a written agreement, by which it was agreed that the property levied on should be sold, and the amount realized applied on the execution; that, in pursuance of this agreement, the property was sold, and \$66 applied upon the judgment. The court said:

"Conceding that" these facts may be shown as they were shown, "we do not think there was such a performance of the judgment by the appellant as to estop him from prosecuting

his appeal. His payment was not voluntary, and was not such a recognition of the judgment as ought to estop him from proceeding with the appeal."

In *Manning v. Poling*, 114 Iowa 20, it is said:

"It is often difficult to determine what will amount to coercion sufficient to render payments involuntary." While in this case the authorities are reviewed pro and con quite fully, the case really turned upon the question whether the plaintiff had a plain and speedy remedy to protect his rights without paying the judgment. It was held that he might have had a restraining order, and that, by securing a restraining order, he could have saved the possession of his property and been fully protected; that payment was not necessary to protect his possession, and, therefore, his conduct was voluntary. The court said: "On giving the security which may have been required, Ferguson's possession could have been fully protected by a restraining order from this court. As this avenue was open to him, his payment was voluntary."

See, also, *Mississippi & M. R. Co. v. Byington Co.*, 14 Iowa 572; see, also, *Green v. Hall*, 43 Neb. 275 (47 Am. St. Rep. 761). In this case, there was an appeal from a deficiency judgment and costs. An execution was issued on the judgment and placed in the hands of the sheriff. A levy was made, and a date fixed for the sale of the property. The execution was returned paid in full, and on the execution a receipt for the costs. All the payments were made while the sheriff held the execution. The appellee, after the case had been submitted for final determination, filed a motion to dismiss the appeal, for the reason alleged that the judgment had been voluntarily paid by one of the appellants. This was resisted on the showing made that the execution was, at the time of the payment, in the hands of the sheriff; that the property was advertised for sale; that the payments were made to avoid the sale of the lots advertised, and it was claimed not to be voluntary. There was no supersedeas to suspend the enforcement of the judgment. The court said:

"Under these circumstances, a sale of the property advertised would have vested in the purchaser a title which could not be affected by the reversal."

It was further said:

"The right of a judgment debtor to have an appeal determined, notwithstanding payment thereof has been coerced by legal process during its pendency, is sustained by" the following authorities (citing authorities).

In *Lumaghi v. Abt*, 126 Mo. App. 221 (103 S. W. 104), it was held that, where a judgment against a person had been entered, and he paid it solely to remove the lien from his property and prevent several prospective real estate deals from being frustrated, the payment did not prevent review upon appeal. It is said:

"If he cannot resist it when execution is attempted, he may as well pay it without execution to save expense and delay; and will not, in such case, be held to have paid voluntarily. The discharge of the judgment in controversy for the purpose of relieving Richardson of his embarrassment did not preclude appellants from suing out a writ of error."

And it was held that there was a distinct difference in the holding that a party who had recovered a judgment could not have it reversed on error, after receiving satisfaction, and the situation of a party against whom a judgment has been given. In the one case, the party is subject to execution and might be forced to pay it before it was reviewed on appeal; whereas, the party in whose favor it was entered is not exposed to the execution.

These cases practically hold that a party may protect his rights from sacrifice by forced sale on execution, or by writ of ouster, by performing the judgment, and thereby saving himself from further embarrassment and costs, and, by so doing, he does not, under such circumstances, release his right to have the case reviewed on appeal. It is said, however, in the last-mentioned case:

"If the defendant should agree not to prosecute the

appeal, and, in consideration of such an agreement, the creditor should abate part of the recovery, extend the time of payment, or do some other act of similar character, then, the right of appeal would be waived, since the controversy would be terminated."

See authorities cited in last case, *supra*, as sustaining the proposition. For a fair review of the authorities, see notes to *McKain v. Mullen*, (W. Va.) 29 L. R. A. (N. S.), page 1. See, also, *Nashville, C. & St. L. R. Co. v. Bean's Executor*, 128 Ky. 758 (109 S. W. 323; 129 Am. St. Rep. 333). In that case, plaintiff recovered a money judgment. The defendant, without superseding the execution of the judgment, prosecuted his appeal. Execution was issued upon the judgment and levied upon certain of appellant's property. In that case, it was said:

"The appeal does not affect the judgment until it is reversed. Hence, if the appellant were unable to give the supersedeas bond . . . in order to obtain a stay of the execution . . . he would be under the necessity of suffering his property to be seized and sold by the sheriff, with added costs and possible sacrifices. Yet, in that event, his right of appeal would not be affected, as otherwise the right of appeal would be valuable only to the rich, who could make the supersedeas bond, and to the very poor, who were execution proof. What one may be compelled to do, he may do without compulsion, without impairing his legal rights."

It was held in that case that the payment of a judgment under such circumstances did not abate the appeal. In *Warner Bros. Co. v. Freud*, 131 Cal. 639 (63 Pac. 1017; 82 Am. St. Rep. 400), it was held that a party against whom a judgment had been rendered is not prevented from appealing by the fact that he has paid the judgment, unless such payment was by way of compromise or with an agreement not to take an appeal. Of course, there are some cases holding to the extreme doctrine that, no matter what the circum-

stances are attending the payment, the payment discharges the judgment, and there is, therefore, nothing for the Supreme Court to review; but that is not the doctrine in this state.

We think that the case now under consideration comes within the rule laid down by this court in *Burrows v. Stryker*, 45 Iowa 700, and *Gilbert v. Adams*, 99 Iowa 519, hereinbefore cited; *Green v. Hall*, 43 Neb. 275 (47 Am. St. Rep. 761).

Inasmuch as the court sustained the plaintiff's motion and instructed the jury to return a verdict for the plaintiff, it is our duty to give to the evidence the construction most favorable to defendants' contention which the record permits. With this idea in view, we have the record disclosing the following facts: That, after judgment was entered in the justice court, an execution was issued to the constable directing him to remove the defendants from the premises forthwith, "and that of the goods and chattels of the defendants, not exempt, he caused to be made the costs by distress and sale thereof according to law;" that, with this writ in his possession, he went to the defendants' premises; that he came with a big wagon and said that he had a proposition from the plaintiff as to just what the plaintiff would do; that he was asked what his proposition was, and he said that the defendants were to have so many of the pigs and one of the calves—the defendants were to have the choice of the calves; that there were seven pigs, and one had to take three and the other four; that he, the constable, was to pick the four smallest pigs and separate them, and the three largest pigs. He was asked, "What about the rest of the stock?" He was told that the defendants had an interest in it. He said that he had no authority as to this, and then said:

" 'You are to take this proposition or I am here with a wagon to move you out. My time is precious. I am fooling away my time for nothing, and you will either take the proposition, or I will have to start to move you.' Mr. See said, 'Of course, then, I will have to do it;' that it was not his choice; that 'If I have to do it, why I have to do it;' that, at

the time, they had corn planted on the place, and had millet seed bought, but not sown; that there were 14 acres of corn and some garden planted."

This was Mrs. See's testimony.

Mr. See testified that, when the constable came, he said "he fetched a proposition from the plaintiff." When asked the terms, he said:

"He (meaning the plaintiff) has agreed to go ahead and divide the hogs and calves, and he sent me down to see if I could get a division."

He was then told by the defendants that they had no right to make a division with him of the stock, and that they had an interest in all the stock; he did not mention anything in regard to the rest of the stock, except the two calves and five pigs.

"He told me, 'You could go to work and have your choice out of the pigs, have four or three. I could have the four smallest or the three largest ones in the division of the pigs; that I could also have the first choice of the calves, and said, 'If you don't accept the proposition, I will move you out in the woods, or in the big road, and I fetched my team for that purpose.' He told me that if I did not accept the proposition, he had a man and was going to take all of the stock, and had Charlie Harvey hired to come down to get the hogs and drive the cattle out. He told me I had to get out whether I divided or not."

Defendants got out. Can it be said that they did this voluntarily?

Section 4220, Code, 1897, provides:

"An appeal or writ of error, taken from the action of a justice of the peace in such action in the usual way, if the proper security is given, will suspend the execution for costs, and may, with the consent of the plaintiff, prevent a removal under execution, but not otherwise."

The proposition was squarely before the defendants either to get out or be put out. It appears that, by the judgment of

the court, it was determined that they must get out forthwith; that an execution was issued, directing the constable to put them out forthwith. He had already appealed from the order of the justice. If the plaintiff had put him out under the writ, there could be no question about his right to maintain the appeal. The fact that he obeyed the mandate of the court and removed without being forcibly ejected certainly does not put him in any worse position than if he had been removed. Under this record, it is apparent that the removal would have followed if he had not obeyed the mandate of the court without being forcibly ejected. The plaintiff fixed the terms upon which he must get out, and gave him no choice in the matter but to accept the proposition or be removed. In no sense can it be said that the evidence conclusively shows that there was a voluntary settlement of or submission to the judgment of the court which would prevent review upon appeal, under any of the authorities cited. The division of the property was not involved in the ejectment suit. He was entitled, under his contract, to an equitable division of the property, whether he stayed or whether he was removed. He gained nothing by removing. Further than that, there was a judgment against him for costs. No provision was made for these costs, and the district court, on dismissing the case, entered judgment against him for all the costs.

We think that the district court erred in not determining this case upon the merits, and in dismissing the defendants' case and entering judgment against them upon the allegations of the supplemental petition.

The case is therefore—*Reversed*.

EVANS, C. J., LADD and SALINGER, JJ., concur.

WALTER PETERSEN, Appellant, v. MCCARTHY IMPROVEMENT
COMPANY, Appellee.

MASTER AND SERVANT: Tools, Machinery and Appliances—De-
fective Material—Evidence. Evidence reviewed, and held sufficient to sustain a finding that the master's nondelegable duty to furnish to his servant reasonably safe tools was violated by furnishing a carrying hook made of such soft metal that the same became easily dulled and would slip from the timbers which the servant was handling.

MASTER AND SERVANT: Tools, Machinery and Appliances—
Choice Between Safe and Unsafe Tools. A servant injured by reason of an unsafe tool may not be defeated in his demand for damages by a showing that the master had other safe tools about the premises, *unless such safe tools were available for use by him.*

MASTER AND SERVANT: Negligence—Method of Doing Work—
Impracticable Method. A servant injured through the use of unsafe tools may not be defeated in his action for damages because he did not employ another way which the evidence reveals was impracticable.

MASTER AND SERVANT: Assumption of Risk—Unsafe Tools—
Factory Act. The plea of assumption of risk in the use of unsafe tools is no longer available to an employer unless the employee is under a duty to repair, and not even then unless the danger from use is imminently perilous. So held in the use of a defective carrying hook.

NEGLIGENCE: Proximate Cause—Neutralizing Negligence of Mas-
ter. Due care by a servant—freedom from contributory negligence—may demonstrate that the negligence of the master was not the proximate cause of the injury, and thus defeat the employee.

PRINCIPLE APPLIED: For carrying heavy timbers, the master negligently furnished grappling hooks with points of such inferior material that they would, to the knowledge of the employee, become dull after handling from 3 to 18 timbers, and would then slip and drop the timber. *But the hooks were perfectly safe when freshly sharpened.* They had been so sharpened just before the employee started to use them. On the occasion in question, the hooks slipped from the *second* timber handled, and the employee was injured. *Held*, the employee had demonstrated that he was in

no wise guilty of contributory negligence, and had equally demonstrated that the negligence of the master was not the proximate cause of the injury.

Appeal from Scott District Court.—WILLIAM THEOPHILUS, Judge.

THURSDAY, MARCH 20, 1916.

ACTION for damages resulted in a directed verdict for defendant. From judgment thereon, the plaintiff appeals.—*Affirmed.*

Fred Vollmer and F. A. Cooper, for appellant.

Lane & Waterman, for appellee.

LADD, J.—I. The defendant was engaged in constructing the Purity Oats Building in Davenport. It was several stories high, and 144 feet long by 72 feet wide. Its outside walls were of brick, and on the inside, uprights were erected about 14 feet apart, on which rested girders, 12 inches by 14 inches, running across the building. Joists 6 inches by 12 inches had been placed with ends in the stirrups attached to the girders about 3 feet apart in 6 or 8 spaces; and in the morning of July 5, 1913, the superintendent of the work sent up four laborers, and instructed plaintiff to "set some of those joists in." The plaintiff was foreman of the carpenters, some 8 or 10 in number, but was directed by the superintendent "to use laborers so as to save money," their wages being less than half those paid to carpenters. The joists were cut down by Hurley, one of the carpenters, so as to be of length and depth to drop into the stirrups at either end. After this was done, a rope was tied around each end, two laborers on each of opposite girders pulled it to the second story, and without accident, set in stirrups 6 inches from the wall. One of the laborers, owing

1. MASTER AND
SERVANT: tools,
machinery and
appliances:
defective ma-
terial: evi-
dence.

to nervousness, left for another to work in his stead; whereupon plaintiff took his place in order to keep the work going, and second joist was lifted by ropes and placed on that previously set and the ropes removed. The two men on each end then took a lay hook and dropped it over the joist, catching the points on either side, and walked out on the girders, and, as plaintiff came nearer the stirrup, he leaned over, preparatory to letting the end in such stirrup, when the other end slipped from the hook held by the two men on the opposite girder and lacked a little of having reached the stirrup, and as the end fell to the floor below, plaintiff lost his balance and jumped down and was injured. The negligence charged is that defendant did not exercise reasonable care in furnishing suitable appliances with which to do the work. The long hook consisted of two circular prongs hung on a swivel in a band around a handle. The lower ends were turned in, with a point slanting upward. The handle was long enough so that a man could take hold at each end and carry whatever the points might be caught into. The evidence tended to show that there were about a dozen of these hooks furnished, only two of which had steel points and were suitable for the purpose of handling timber. The points on the others were of poor material, and soft, and, after being sharpened, would get dull from using 4 or 5 times, as testified by Hurley, or 18 or 20, as testified by plaintiff, and would bend over. Lage testified that the hooks when sharpened "would not stay sharp. The material was no good and it didn't hold. I complained to Gleason as to the condition of the hooks." Petersen testified:

"The hooks other than the one pair were not good: they didn't have material in them to hold, they would slip off. They would pull apart. . . . We would file them up and they would not stay sharp. There was not good stuff in them or they would stay sharp."

From this evidence, the jury might have found that the hooks other than two with blue handles and steel points were

neither safe nor suitable for the purpose for which furnished. The rule is "elementary that the employer is required to exercise reasonable care in furnishing appliances which, if handled with ordinary prudence, can be safely used by the employee in the performance of the task assigned him, and he is responsible therefor whether this duty is performed by himself or through another." *Funk v. Leonard Construction Co.*, 159 Iowa 320. Or, as said in *Brann v. Chicago, R. I. & P. R. Co.*, 53 Iowa 595: The defendant was "bound to use ordinary care in the selection of machinery and appliances, so as not to subject the employees to unreasonable danger, that must follow from insufficient tools and appliances, or which are out of repair, and, therefore, insufficient for the purpose intended."

II. It is contended that, as two hooks were suitable and safe, and these might have been selected, the defendant was not responsible for the choice of those which were unsafe. See *Funk v. Leonard Construction Co.*, *supra*.

2. MASTER AND
SERVANT: tools,
machinery and
appliances;
choice between
safe and un-
safe tools.

As appears, however, the two hooks were not adequate for the requirements in performing the work. Hurley, before handing those used, searched for the steel-pointed hooks and was unable to find them. He testified:

"I looked around for them on the first floor and couldn't find them. . . . We usually kept them out at the saw unloading cars. I do not know where they were using them. I didn't find them. Were usually kept out at the saw on the south side and sometimes on the other building. . . . They are usually kept in the tool shed. I don't know whether they picked them up at night or not. We had laid one whole floor of joists and a part of the second floor before Petersen got hurt. We went on with these hooks and laid all the other floors. . . . Had occasion just before the accident to look for those blue handled ones (steel pointed). . . . Petersen said 'Get a couple of hooks,' and I went to get them. Didn't inquire of anybody where they were. Looked around and picked up two hooks and sent them up. . . . The

class of men that were setting joists were laborers. Did not use laborers in this class of work after Petersen got hurt. . . . Carpenters set the joists in the stirrups," as they demanded that they be allowed to do so.

Lage testified that the steel-pointed hooks were "down at the big timbers, and they were using them for lifting the big timbers up on the bench and roll and cut them their length;" at the time Petersen was hurt that six laborers and one carpenter were there engaged in cutting 12-inch by 14-inch girders. From this evidence, the jury might have found that the choice of safe and suitable hooks was not available to Petersen as foreman or those working under his direction, and that the only hooks available were those of the kind actually made use of.

III. Counsel for appellee argue that, if suitable hooks were not furnished, ropes should have been used. The evidence was such as to show that ropes might have been impracticable for the purpose of placing the joist.

3. MASTER AND
SERVANT: neg-
ligence: meth-
od of doing
work: imprac-
ticable method.

But Hurley testified:

"The joist had to be set with hooks; could not be set with a rope, because, if you put a rope on, you would have to tie it back a foot from the end anyhow, and you start walking,—there are three feet between centers, and you walk on a 12-inch joist and you are pulling this way on your ropes. If you tie it back a foot from the end, you can't get them in your stirrups. They are always pulling against each other. If you put on a hook, you can catch right within three inches from the end; right in close and set it down, and in order to get it in the stirrup, take the hook off and hit it with your foot. Know of no other practical way that they could have been set into the stirrups. We set down all with hooks. . . . If you take a rope to set them, two men can't walk on a girder twelve inches wide, because your rope would be out too far and you would be pulling against each other and have to lift them pretty high—a foot over the stirrup—before you started in,

and the weight of them, I don't believe four men could put them in with a rope."

Lage's and Petersen's testimony was substantially the same. The record was such that the jury might have found that neither the use of rope nor a derrick (as the first floor was covered with brick) would have been practicable for the purpose of placing the joist in the stirrups. If, then, such were the conclusion, and the hooks from which choice must have been made were defective, the defendant might have been found negligent, as alleged in the petition.

IV. Appellee suggests that in any event, as plaintiff knew the defective condition of the hooks, he assumed the risk of injury in using them. This might have been so but for

4. MASTER AND
SERVANT: as-
sumption of
risk: unsafe
tools: Factory
Act.

the enactment of Section 4999-a 3, Code Supp., 1913. A master may no longer shield his negligence by casting the burden on his employe to ascertain at his peril whether he can safely take the chance of working, notwithstanding such negligence, save where it is the duty of the employe to remedy the defect; and not even then unless the danger is imminent, and such that a prudent person would not have continued in the work. *Correll v. Williams & Hunting Co.*, 173 Iowa 571. This is not such a case, and the doctrine of assumption of risk was not available to defendant.

V. The close question in the case is whether plaintiff was guilty of contributory negligence. He was fully aware of the condition of the hooks defendant had furnished with which

5. NEGLIGENCE:
proximate
cause: neu-
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ter.

to place the joists. He had examined the hooks that morning, and testified that "they were fixed up pretty good and were in pretty good shape. . . . They looked as if they were in good condition to work." They had been filed shortly before being used. The joist being placed was the first or second after the hooks had been sharpened. He testified further:

"A few good heavy timbers would dull them up. On

such timbers as the joist they would last longer. About 20, I guess. You would have to sharpen them if you wanted to be on the safe side. . . . If you file them every 20 joists you lifted, you would have to file them 150 or 200 times. I didn't file them every 20 joists. . . . They would stay sharp about 18 joists. . . . Safety required that the hooks be sharpened."

He testified that setting these joists was carpenters' work; that the rules of the carpenters' union forbade its being done by laborers; that carpenters might drive the points of the hook in with a hammer, but that the use of a hammer on a building by a laborer was not allowed by such rules; that laborers might have used hammers, but were not supposed to; that the hooks are supposed to hold without driving them in; that he knew they were defective, but did not tell them to drive the points in; that he could have taken a hammer and done so himself, but thought this was not needed because he thought they would sure hold; that he would have hammered them had he supposed they would not hold. Other witnesses testified that the hooks, after being sharpened, would hold for three or four joists. From this, the jury might have found that plaintiff was not negligent in using the hooks immediately after being sharpened, for carrying the second joist, without hammering the points of the hook in or causing others to do so. The necessary result of this conclusion, however, is to exonerate the defendant; for if the hooks, when freshly sharpened, were safe for use,—and that they were is undisputed,—the alleged negligence of defendant in furnishing those of poor material could not have been the proximate cause of the timber's falling. In other words, in proving plaintiff to have been free from contributory negligence, the evidence exonerated defendant, by showing that the hooks, though defective when furnished, had been made suitable for the purpose for which plaintiff was using them; and therefore that the falling of the timber was not in consequence of any fault on the part of defendant. The hook must have slipped from the timber,

then, owing to something done or omitted by the laborers carrying that end of the timber; but if this constituted negligence, it was that of a fellow servant, and for this reason, not the basis of an action against the common employer. *Forney v. Mardis*, 155 Iowa 667.—*Affirmed*.

EVANS, C. J., GAYNOR and SALINGER, JJ., concur.

E. C. WAGLE, Appellee, v. IOWA STATE BANK, Appellee,
ALEX JENKINS, Appellant.

DEEDS: Alterations—Alterations Subsequent to Delivery—Failure
1 to Redeliver and Reacknowledge—Constructive Notice. Material alterations in an instrument affecting real estate, made *subsequent* to its complete execution, acknowledgment and delivery, and with the consent of the grantor, have the effect of creating an entirely *new* instrument and, in order that the recording of such altered instrument may carry constructive notice of its contents, it is necessary that there be a *redelivery*, a *reacknowledgment* and a *rerecording*.

PRINCIPLE APPLIED: One Jenkins owned real estate subject to a \$400 mortgage. He gave a bank a \$600 unacknowledged mortgage. Later, he and his wife executed, acknowledged and delivered to Mary Paulley a deed to the property "free from incumbrance, except \$1,000 which grantee assumes and agrees to pay." This mention of "\$1,000" was intended to embrace the \$400 and the \$600 mortgages. This Jenkins-Paulley deed, *as originally executed*, was never recorded. Still later, Mary Paulley married one Trahan, and certain negotiations were had; and Jenkins, but not his wife, consented, in writing, that the name "Mary Paulley" might be erased from her deed, and Trahan's name inserted. This was done, and while, in legal effect, Jenkins made a redelivery of the altered deed to Trahan, neither he (Jenkins) nor his wife *reacknowledged* the altered deed. The altered deed was then recorded. Still later, Trahan conveyed the property to one Wagle, "subject to a mortgage of \$400, or the record liens now shown against said property." Wagle, prior to his purchase, discovered only the \$400 mortgage and bought, for full value, on that understanding, and without knowledge of said alteration; still later, the said bank obtained an acknowledgment of its \$600 mortgage and placed it of record. *Held*, the alteration in the Jenkins-Paulley deed rendered it non-recordable without a new

acknowledgment by Jenkins and his wife, and therefore Wagle was not charged with constructive notice of the record of the altered deed.

DEEDS: Delivery—Acts Constituting Delivery. Anything which
2 signifies the intention of the grantor of a deed to part with his dominion over the paper, so that it may become a muniment of title in the grantee, operates as a legal delivery.

PRINCIPLE APPLIED: One Jenkins conveyed land to one Mary Paulley. Later, Mary married one Trahan. For some reason, it was desired to erase Mary's name as grantee and to insert her husband's name in lieu thereof. The deed was then in the possession of the husband, of which fact Jenkins had knowledge. Jenkins consented to the proposed change. The change was made by the husband's agent. *Held* sufficient to constitute a delivery of the altered deed to the husband.

PRINCIPAL AND AGENT: The Relation—Sufficiency of Evidence.

3 Evidence reviewed, and *held* insufficient to constitute the relation of principal and agent.

MORTGAGES: Recording—Failure to Record—Loss—Who Charge-

4 able. When the non-recording of a mortgage results in loss by reason of intervening rights, the mortgagor must suffer the loss, when his failure to acknowledge the mortgage prevented such recording.

Appeal from Polk District Court.—W. H. McHENRY, Judge.

MONDAY, MARCH 20, 1916.

ALEX JENKINS acquired Lot 14 in Block 3 in Rollinson's Garden Addition to Ft. Des Moines,—since taken into the city of Des Moines, May 12, 1909,—subject to a mortgage of \$400. On August 7, 1909, Jenkins, his wife joining, executed a mortgage to the Iowa State Bank, as collateral security for the payment of the purchase price of lots bought on contract. This mortgage was first filed for record August 25, 1913. Not having been acknowledged, it was subsequently withdrawn and acknowledged September 11, 1913, its date being changed accordingly, and it was again filed for record on the same day. Jenkins, his wife joining, executed a special warranty deed to Mary Paulley, October 10, 1910, reciting therein that

said premises were "free from incumbrances, except \$1,000 which the grantee assumes and agrees to pay." Such agreement was the entire consideration. This deed, in the form stated, was never recorded. On January 2, 1912, Jenkins authorized in writing the name of Napoleon Trahan to be inserted as grantee in the deed, instead of that of Mary Paulley, whom Trahan had married. This change was probably made by one Wilson, who procured Jenkins' consent, and the deed, as so changed, was filed for record January 3d following. On March 6, 1912, Trahan entered into a contract to exchange the lot, "subject to a mortgage of \$400 or the record liens now shown against said property," to plaintiff for real estate in Webster City worth about \$500; and in pursuance thereof, delivered to him a deed dated December 13, 1911, which was filed for record March 18, 1912. At that time, there was an outstanding tax sale certificate, to redeem which the plaintiff paid \$40.40, and the taxes payable that year were unpaid, and the lot was worth \$1,000. Prior to receiving the deed, plaintiff made search of the records in the county recorder's office and found of record the \$400 mortgage only. Plaintiff tendered the Iowa State Bank \$1.25, and demanded the execution by it of a quitclaim deed to the premises. This was refused, and thereupon this suit was commenced, praying that title be quieted, that the mortgage of \$600 be canceled of record, and that an attorney's fee of \$25 be taxed against said bank. Both defendants answered, and Jenkins filed a cross-petition, demanding that the amount of the mortgage be applied by the bank on his indebtedness to it. On hearing, decree was entered as prayed by plaintiff, the cross-petition was dismissed, and \$25 as attorney's fees taxed against the bank. Jenkins appeals.—*Affirmed*.

Brown & Missildine, for appellant.

William B. Brown and *E. C. Corry*, for appellees.

LADD, J.—I. The controversy is over a mortgage of \$600

executed by Alex Jenkins, August 7, 1909, on a lot then owned by him, to the Iowa State Bank, and not recorded until September 11, 1913. In the meantime, October

1. **Demos:** alterations: alterations subsequent to delivery: failure to redeliver and reacknowledge: constructive notice.

10, 1910, Jenkins, his wife joining, executed a warranty deed conveying the lot to Mary Paulley, "free from incumbrances, except \$1,000 which the grantee assumes and agrees to pay." This deed was not filed for record until January 3, 1912, after the name of the

grantee, Mary Paulley, had been erased, and that of Napoleon Trahan, whom she had married, inserted instead. This was done in pursuance of written authority of Jenkins, given the defendant before deed was recorded. Trahan and wife conveyed the lot to the plaintiff by warranty deed, dated December 13, 1911, but recorded March 18, 1912, "subject to the mortgage of \$400 or the record liens now shown against said property." This mortgage covered the lot when Jenkins acquired it in April, 1909.

No question is made but that plaintiff was charged with notice of the recitals in the conveyance from Jenkins to Trahan, if that conveyance as changed was acknowledged. *Aetna Life Ins. Co. v. Bishop*, 69 Iowa 645; *Huber v. Bossart*, 70 Iowa 718. Appellee (plaintiff) contends, however, that, as the change in names of grantee occurred after the deed became effective by delivery to convey the land to Mary Paulley, the substitution of the name "Napoleon Trahan" as grantee, instead of hers, operated as a new deed. Conceding, as appellant contends, without so deciding, that the grantee ratified this change, we inquire whether in such circumstances the deed must have been redelivered and reacknowledged, in order that the record thereof shall be constructive notice to third persons. If so, then plaintiff, in acquiring the lot from Trahan, was not charged with notice of recitals in the deed from Jenkins to Trahan, and took it freed from the lien of the mortgage. On the other hand, if another delivery and acknowledgment were not essential to the recording of

the deed and thereby imparting constructive notice, then plaintiff must be deemed to have been put on inquiry concerning the mortgage in acquiring title to the lot. There is no claim that the acknowledgment is defective; the contention is that, in the form recorded, it had not been acknowledged at all; and therefore the record of it did not impart constructive notice.

Of course, the wife of the grantor, not having consented to the change, was not bound thereby. For all that appears, she might have been perfectly willing to join in a deed to Mary Paulley, and yet decline to part with her dower interest to Trahan. Nor do we think a change in the parties to a deed—that is, of grantee or grantor—after its delivery can effect the symbolic transfer of title already accomplished, or can be made without creating of it a new instrument of conveyance. The instrument, prior to alteration in such circumstances, has accomplished its purpose by the transmission of title to the then grantee, and the latter is not divested by the change. If anything is destroyed by the change, it is the deed, and not the title.

A deed may be altered, mutilated, changed or wholly destroyed so as to be no longer competent evidence or capable of being introduced in evidence, yet the title vested in the grantee is not thereby destroyed. 1 Devlin on Real Estate (3d Ed.), Sec. 461a; 13 Cyc. 721; *Waldron v. Waller*, 32 L. R. A. (N. S.) 284, 293, and note. In *Gibbs v. Potter*, 166 Ind. 471 (9 A. & E. Ann. Cas. 481), the court announced the principle to be well settled that the alteration or destruction of a deed subsequent to its full execution, although done by consent of parties, will not divest the original grantee of title or revest such title in the grantors. *Stanley v. Epperson*, 45 Tex. 644; *Tabor v. Tabor*, 136 Mich. 255 (99 N. W. 4); 9 Am. & Eng. Ency. of Law (2d Ed.) 163; *United States v. Widow and Heirs of West*, 22 How. (U. S.) 315 (16 L. Ed. 317); *Woods v. Hilderbrand*, 46 Mo. 284 (2 Am. R. 513); *Wheeler*

v. Single, 62 Wis. 380 (22 N. W. 569). See *Slattery v. Slattery*, 120 Iowa 717. Where the instrument is so changed as that purported conveyance is to a different person from the original grantee, or purports to convey different property, it is, in effect, a different instrument, and must be redelivered and reacknowledged to become effective as a conveyance and to be recorded. Thus, in *Moelle v. Sherwood*, 148 U. S. 21 (37 L. Ed. 350), the description of the property in the deed was changed after it had been delivered and recorded, and the court said:

“An alteration in the description of property embraced in a deed, so as to make the instrument cover property different from that originally embraced, whether or not it destroys the validity of the instrument as a conveyance of the property originally described, certainly does not give it validity as a conveyance of the property of which the new description is inserted. The old execution and acknowledgment are not continued in existence as to the new property. To give effect to the deed as one of the newly described property it should have been reexecuted, reacknowledged, and redelivered. In other words, a new conveyance should have been made.”

In *Waldron v. Waller*, 65 W. Va. 605 (32 L. R. A. (N. S.) 284, 285), the change was by adding to the property conveyed after delivery of the deed, and the court observed that:

“The authorities we think make it clear that, although such alteration may have been with the consent of the grantors, the deed cannot operate to invest in the grantee land not covered by the original grant, without a redelivery of the deed by them, and if it has been acknowledged before the alteration, the deed should be again acknowledged”—citing, among other authorities, 1 Devlin, Deeds, Sec. 461a.

Cases are sometimes cited as holding to a contrary doctrine, but upon examination they do not seem to impair the rule as stated. Thus, in *Baker v. Baker*, 239 Ill. 82 (87 N. E.

868), the deed, after having been acknowledged, was taken to the notary's office to attach the notarial seal, when he was advised by the grantee that grantor wished him to attach the name of the grantee's wife as one of the grantees. He did so and attached his seal, and turned it, with other deeds, over to the original grantee, who carried them to the grantor. The latter read the deed over and then delivered it to said grantee's wife. This was held to have been an adoption of the deed in its altered condition and that it was valid. The question of notice and whether it should have been reacknowledged were not involved. In *Abbott v. Abbott*, 189 Ill. 488 (82 Am. St. 470), the court expressly found the changes to have been made before delivery. In *Stiles v. Probst*, 69 Ill. 382, the deed was redelivered and the question of notice was not involved. In *Hunt v. Nance*, 122 Ky. 274 (92 S. W. 6), the existence of actual notice was found, and whether the interlineation after delivery changed the estate conveyed was not decided. In North Carolina, legal title does not pass until registration, and, prior thereto, no right intervening as between the grantor and grantee, the deed may be surrendered to the grantor, canceled or changed as may be agreed by them. *Respass v. Jones*, 102 N. C. 5; *Davis v. Inscocoe*, 84 N. C. 396.

In *Chezum v. McBride*, 21 Wash. 558 (58 Pac. 1067), the court, without discussing this question, upheld a title founded upon a deed which had been altered by adding a section number in the description of the land conveyed, and by inserting upon the margin of the deed a further description, where it appeared that the alteration had been ratified by grantor, and he had never afterwards exercised any act of ownership over the land in controversy. Whether the land originally intended to be conveyed lay in both section numbers, or in the one originally in the deed, or in the one inserted, cannot be ascertained from the opinion. In *Eadie v. Chambers*, 24 L. R. A. (N. S.) 879 (18 A. & E. Ann. Cas. 1096), the court held that an alteration reducing the fractional interest of a

mine conveyed, from three fourths to one half, would convey one half thereof if the deed were redelivered. Manifestly this would be so, for the deed before altered would convey that much.

It will be observed that none of these decisions are in conflict with the rule as stated that, where the name of the grantee or the description of the property has been changed after delivery, the changed instrument must be regarded, as to the new grantee or the property not previously included, as a new instrument, exacting delivery and acknowledgment to be recordable. Appellant relies somewhat on cases where deeds are acknowledged before the names of the grantees have been inserted. See *Creveling v. Banta*, 138 Iowa 47; *Hall v. Kary*, 133 Iowa 465. There, the acknowledgment is of a conveyance to a person whose name is subsequently to be inserted; while here, it was of an instrument conveying the property to a designated person. In the former, the insertion of the name is essential to effect the transfer of the legal title; in the latter, the conveyance has been completed, and the change is undertaken in order to transfer title from one grantee to the other. The cases are not analogous. We are of opinion that, to become effective as a conveyance, the deed as changed must have been delivered to the new grantee (Trahan) and that, to be recordable in its new form, it must have been acknowledged again.

II. If delivered, however, it would operate as evidence of such conveyance as it purported to be. It appears that one Wilson, acting as the agent of Napoleon Trahan, procured Jenkins' written consent to the substitution of

2. DEEDS: delivery: acts constituting delivery.

his name in place of that of his wife in the deed. Jenkins testified that he authorized

Wilson to make the change. The evidence

warrants the inference that he then understood that the deed was in Trahan's possession, and that he would treat it as a conveyance to him. In these circumstances, it would have

been an idle ceremony to recall the deed and immediately return it as a delivery. Both parties treated what was done as passing the deed when changed to the custody of Trahan, and it was in effect a delivery of the deed to him. The plaintiff received the conveyance from Trahan and wife to himself without knowledge of the conveyance to Mary Paulley; for in its original form it was not recorded, and in its changed form was not recordable, because of not having been acknowledged subsequently to the substitution of plaintiff's grantor (Trahan) as grantee. The plaintiff took, then, without notice of the contents of the deed to his grantor.

III. Wilson, the agent of Trahan, knew of the existence of the recorded mortgage, and it is claimed that, in examining the records, he was agent of plaintiff; and by reason thereof, his knowledge of such mortgage was imputed to plaintiff. Without deciding whether this would be so, it is enough to say that the record does not warrant the finding that Wilson ever acted for plaintiff. True, he accompanied when the county records were searched; and plaintiff, after testifying that he had relied on Wilson's statement that the only mortgage against the lot was that of \$400; that Wilson was but his agent, that he procured the county recorder to examine the records for him, and that the latter said that said mortgage was the only one shown in the records, was asked, "Who besides the county recorder or her deputy did you have make the search for you? A. Mr. Wilson." In view of the fact that Wilson was then representing Trahan in making the trade with plaintiff and was trying to satisfy plaintiff as to the condition of the record, the witness could have meant no more than that Wilson was with him making the search of the records, and should not be understood as having employed him as his agent or employee in so doing.

IV. The cross-petition of Jenkins was rightly dismissed. The \$600 mortgage, when delivered to the bank as

2. PRINCIPAL AND
AGENT: the re-
lation: suffi-
ciency of evi-
dence.

collateral security, had not been acknowledged. That this was not done was the fault of the mortgagor (Jenkins), and not of the bank. The instrument without acknowledgment might not have been recorded, and therefore the bank was in no manner blameable in not filing it for record. The plaintiff paid full value for the lot. Agreement to pay the \$600 was part of the consideration for the execution of the deed by Jenkins to Paulley. In consequence of the machinations of Wilson, someone must lose the amount secured by the mortgage. As between plaintiff and Jenkins, the former is least blameable; for Jenkins was not only responsible for withholding the mortgage from record, but consented to transformation of the deed to Mary Paulley into a different instrument.

We are content with the decree, and it is—*Affirmed*.

EVANS, C. J., GAYNOR and SALINGER, JJ., concur.

WILLIAM WILMES, Appellant, v. CHICAGO, GREAT WESTERN RAILROAD Co., Appellee.

NEGLIGENCE: License—Non-Licensed Use of Premises—Effect. It

- 1 is suggested that a license to cross private grounds for one purpose affords no protection to the licensee when crossing such premises for a purpose for which he has no license.

PRINCIPLE APPLIED: See No. 2.

NEGLIGENCE: Trespassers—Attractive Agencies—Railway Wreck.

- 2 An owner or occupant of premises owes no duty to an infant who, without the knowledge or invitation, express or implied, of such owner or occupant, goes, out of idle curiosity, upon such premises, and is injured by some dangerous agency. And the existence of a railway wreck, consisting of two overturned box cars and promiscuously interwoven trackage, does not constitute such a known, attractive and dangerous agency as to amount to an implied invitation to children to come upon the premises, out of idle curiosity, to view it, and thus bring the child within the "law of attractive agencies."

PRINCIPLE APPLIED: Two box cars, by reason of a wreck, were overturned at 9:30 A. M. in plain view and within 100 yards of defendant's roundhouse, and within three blocks of a public school, and at a point where the right of way had for years been used by pedestrians as a place for public travel. One of the rails was so bent and confined in the interwoven wreckage, that, without anyone's knowing such to be the case, it was under great tension. The wreckage did not suggest danger to anyone approaching or passing it. Plaintiff, 11 years of age, had, prior to this time, frequently traveled a near-by path on the right of way in carrying dinner to his father. Three hours after the wreck occurred, during which time the wreckage was wholly unguarded, plaintiff, on his way to school, went out of his way, from curiosity, to view the wreck. While standing near the bent rail, two men came along and laid their hands upon the said rail. Instantly it was released and sprang back and injured plaintiff. *Held*, plaintiff was a trespasser and defendant owed him no duty—that the existence of said wreckage did not constitute such a dangerous and attractive agency as to amount, impliedly, to an invitation to children to come, out of curiosity, to view it.

Appeal from Pottawattamie District Court.—O. D. WHEELER,
Judge.

MONDAY, MARCH 20, 1916.

ACTION to recover for personal injury. Directed verdict for the defendant in the court below. Plaintiff appeals.—*Affirmed.*

Killpack & Northrop and *H. L. Robertson*, for appellant.

Saunders & Stuart and *Carr & Evans*, for appellee.

GAYNOR, J.—This is an action to recover damages for personal injury. It is claimed that the defendant, while operating a railway, had a wreck on its road in the city of Council Bluffs, near a point where Sixth Avenue crosses Third Street; that in such wreck one of the rails on defendant's line of track was thrown into a curved position and held there by the strain of the wreckage upon it, and remained in such curved position for some hours; that the wreck was at a point where

defendant's right of way had, for many years, been used by pedestrians as a place for public travel, all with the full knowledge of the company; and that the company had full knowledge of the condition in which the rail was left and its danger to the traveling public; that, in the exercise of reasonable care for the safety of persons generally, the defendant should have known of the danger in leaving the rail in its strained, curved position; that, with such knowledge, it permitted the rail to remain in such position without guard or any person to keep the traveling public from approaching it; that, while plaintiff was passing the rail in the condition hereinbefore described, it was suddenly relieved of its strain and immediately sprang with great violence from said curved position to a straight line, and injured the plaintiff. Defendant filed a general denial. At the close of the testimony, the court sustained a motion to direct a verdict for the defendant on the ground that no negligence on the part of the defendant had been shown, and that no situation had been disclosed wherein the defendant could be reasonably held to anticipate danger to anyone. Thereupon, the plaintiff's petition was dismissed, and judgment entered against him for costs. Plaintiff appeals, and assigns error upon the action of the court in so holding.

The evidence submitted is substantially as follows: At about 9:30 in the morning of the accident, on the corner of Sixth Avenue and Third Street, two freight cars were wrecked and tipped over on defendant's line. The remainder of the train, from which the wrecked cars were thrown, went on and left them. The wreck was in plain sight of defendant's roundhouse, not more than 100 yards therefrom. The scene of the accident was about three blocks from the Third Street school. The wreck caused one of the rails to curve upward and outward. One of the ends of the rail was fastened down by spikes, and the other end concealed, either in the pile of wreckage or under the car. It had been in that condition for about three hours before the plaintiff arrived. Immediately upon plaintiff's arrival, he stopped by the curved rail. Two men

came along and put their hands upon the rail, and it immediately sprang out with great violence and struck the plaintiff and injured him. Plaintiff, at the time of the accident, was about 11 years old and a school boy. The injury occurred about 12:30 in the afternoon. During this noon hour, after the boy had had dinner, he left his home to go to school. He went down where the cars were wrecked, not having heard of the wreck before. He did not need to go that way to school. There was no railing or guard around the wreckage, and there was no one to keep persons from approaching the wreckage. There is no evidence that anyone connected with the company knew of this bent rail. There is evidence that for many years the public traveling on foot had used defendant's right of way, and that there was a footpath that plaintiff had used prior to this time, running near the place where this wreckage was, and which, before that time, he had used in carrying dinner to his father, who worked at some point beyond the place of the wreck.

I. The plaintiff bases his right to recover on the theory that the wreck, as left by the defendant upon the right of way, was a thing attractive to children of the age of the plaintiff and was dangerous, and should have been guarded. There is some suggestion in argument that the plaintiff had a right to be where he was at the time of the injury, because he had, previously to that time, passed over the track or path in close proximity to the place where the wreck occurred, in carrying dinner to his father at some point beyond the wreck; that, because he had used this path for that purpose before, he was not a trespasser at the time that he was injured, and that the company owed him some duty to keep the path so used free from dangers imperiling the safety of those who were using the path under an implied license. But it is apparent from this record that the plaintiff was not, at the time, pursuing any right which he acquired, if he acquired

1. NEGLIGENCE:
license: non-
licensed use
of premises:
effect.

any as licensee; so we give no attention to this phase of the case.

Plaintiff relies and must rely for his recovery upon what is known as the law of dangerous and attractive agencies. Appellant calls our attention to and relies upon the doctrine so ably announced in *Edgington v. Burlington*

2. NEGLIGENCE:
trespassers:
attractive
agencies: rail-
way wreck.

ton, C. R. & N. R. Co., 116 Iowa 410, and cases therein cited. In that case are reviewed nearly all the authorities bearing upon the question here under consideration, and since the opinion was filed it has been uniformly followed by this court. In every case in which the question there determined has been before this court for review, the doctrine announced has been fully recognized and adhered to. See *Fishburn v. Burlington & N. R. Co.*, 127 Iowa 483; *Brown v. Rockwell City Canning Co.*, 132 Iowa 631; *Anderson v. Ft. Dodge, D. M. & S. R. Co.*, 150 Iowa 465; *Hart v. Mason City Brick & Tile Co.*, 154 Iowa 741; *Ashbach v. Iowa Tel. Co.*, 165 Iowa 473. We are fully persuaded that the doctrine announced in that case is not only a correct doctrine, but one just and humane, and fully in line with the best reasoned cases in other jurisdictions.

An examination of the authorities shows a recognition and application of the following well established rules:

First. It is the duty of each member of organized society to use his own property so as not to injure, unnecessarily, the property or person of another. It is all expressed in the doctrine, so long recognized that it has become axiomatic: *Sic utere tuo ut alienum non laedas*,—no man is at liberty under the law, to use his own property so as to endanger the property or person of another. This doctrine had its origin and growth in and out of necessity, and the necessity for it was found in the growth and development of our social organization. When men came together in social compact, it was found that the fullest enjoyment of social right and duty can be attained only when each is required to conduct himself and

manage and control the property over which he was given the individual right of supervision so that the rights and interests and welfare of other members of the social compact may not be interfered with or impaired unreasonably or unnecessarily; that each must exercise his own individual right with due regard for and in recognition of the right of others, to the fullest enjoyment of their rights of person and property within the limits of the social compact. This rule does not impinge upon nor impair the right of the individual to the exclusive enjoyment of his own property, unmolested and undisturbed by others. But, in the exercise of this right, an obligation, under the law, rests upon him as a member of the social compact, to exercise his rights in a manner that may not unfairly and unreasonably or unnecessarily imperil the safety or welfare of another. Every right given to the individual in a social compact is given and held under this restriction.

In the management and control of property, the owner has a right to determine for himself the use to which it shall be put, and the condition in which it will be maintained, provided he does not violate this fundamental doctrine. To this end, he is required, as a member of the social compact, to exercise reasonable care in the discharge of this duty. When this duty is discharged his obligation is discharged, and beyond this he assumes no liability, no matter what happens. In any particular case, the question involved is: Has the party discharged this obligation, or has he failed to discharge it? Having discharged his obligation, he has not failed in any duty that he owes to others; but, failing to discharge it, he is held responsible as for negligence.

Negligence always presupposes a duty and a failure to discharge that duty. Therefore, before we can fix liability for the doing of, or the failure to do, a particular act, we must first ascertain whether or not, under the law, it was the duty of the party to do the thing charged, or not to do the thing charged. As said before, everyone has an absolute right

to the exclusive possession, management and control of his own property. He owes no active duty in this to one who wrongfully comes upon his property; one who is a mere trespasser. If one enters upon the property of another unbidden, he violates the right of the other to the exclusive possession and control of his own property. He becomes a mere trespasser upon the rights and domain of the other, and assumes all the risks incident to such trespass; and he must be held to have assumed all the dangers which he encounters in such wrongful proceeding. Having violated the right of the other to the exclusive possession and enjoyment of his property, he cannot be heard to say that, in violating that right, he encountered hidden dangers which resulted in his injury. Thus it is held that one who, without authority, without license or permission, "officiously or needlessly" interferes or meddles with the property of another to which he has no legal right, has no complaint if he is thereby injured. One who enters upon the property of another can only complain of the manner in which another maintains his property when he is able to show that he is rightfully upon the other's property by invitation or otherwise. This invitation need not be expressed. It may be implied from the relationship or the conduct of the parties. The invitation may be found in the conduct of the party, in the use of his property, and in the manner in which it is maintained. As said in the *Edgington* case:

"If, however, the owner take away the fence, throwing his lot open in unused and unimproved condition, leaving the public to swarm over and across it, and children to play upon it, he cannot be held innocent of wrong if by his act the semi-public use of his property is made hazardous to human life, and he fails to take reasonable precaution against the danger thus occasioned."

The duty to maintain it in a safe condition is measured by the use to which the property is put, and the danger to others which may be reasonably anticipated to result from the condition in which it is kept. No one questions "the rules

which assure to a person dominion over his own property and deny protection to the trespasser in his wrongdoing." These are of the most ancient origin, and are just. But, however exclusive the right of the owner of property, real or personal, to deal with it as he likes, yet his dealing is always subject to the Latin maxim hereinbefore set out.

In every case of the kind that we are dealing with now, in so far as the conduct of the party is involved, the question is: Did he violate any duty that he owed to the general public or to particular individuals, in the manner in which he managed, controlled, or left his property touching which he is charged with negligence? The relationship of men to property and to each other is so multifarious, so varied, that even the best pronounced general rule for their government is found to involve much difficulty in its application.

II. We gather further from the cases heretofore referred to that, if one maintains upon his place a dangerous place or instrumentality, and, without warning against such dangers, invites another to come while the place or instrumentality remains exposed or unguarded, without warning or protecting him against such danger, he is liable to the one so invited, if, without fault on his part, he receives injuries therefrom. We gather the converse of this proposition that, if one wrongfully, without leave or license, unbidden, enters upon the premises of another upon which there is a dangerous place or instrumentality, he assumes all the hazards of the place—this upon the theory that he is a trespasser upon the property and rights of the other, and the other owes him no duty except not to actively or willfully inflict the injury upon him.

This brings us to the question, What constitutes an invitation? These authorities hold that one who maintains upon his place, and permits to remain exposed, something dangerous when approached or used, and of such an attractive character that he knows, or, as a reasonably prudent man should know, it will invite the attention of children and draw them to it, because of their sportive and playful natures, he impliedly

invites them to come; that, in exposing such an instrumentality, with the knowledge that it will attract children, he occupies the same position when they come as if he had beckoned to them and they followed. We are not here discussing the question of contributory negligence on the part of the child. We will assume the child too young to be chargeable with negligence. We are not dealing with a trespassing child; for no one is a trespasser who comes by invitation of the owner. All the cases of attractive nuisance seem to rest upon the thought that exposing anything of a character that appeals to children's nature, and, by appealing, draws them to it, is, in its very nature, an implied invitation to them to come. It is not material in an inquiry of this kind whether the children had been accustomed to come or not; whether it had remained a long time or a short time. The question is: Did the party charged expose to the public a thing of such an attractive nature that, as a reasonably prudent man, he should have known that it would draw children to it, and, having drawn them there, they were likely to be injured from the character of the instrumentality?

These cases of attractive nuisance deal only with children who are not sufficiently mature and discreet to have legal capacity to assume a risk. If one is of mature age, or of sufficient age to know and appreciate the danger that attended his act, even though attracted by the instrumentality, he cannot complain if he is injured. He cannot go into a place the danger of which he appreciated and understands, even though attracted to it, and recover if he is injured.

The material facts of the instant case are that two freight cars were wrecked and tipped over on defendant's line. The wreck caused one of the rails to curve upward and outward, one end of the rail being fastened by spikes, and the other concealed either in the pile of wreckage or under the car. This condition had remained about three hours before plaintiff's arrival. Plaintiff heard of the wreck and came down out of curiosity to view it. The only purpose that he had in

coming there was to view the wreck. When he arrived, he stopped by the curved rail. Two men came along and put their hands upon the rail, and it immediately sprang out with great violence and struck the plaintiff and injured him. What these men did when they placed their hands upon the rail does not appear. The fact disclosed is simply that they placed their hands upon it and that immediately it sprang out. Plaintiff, at the time, was 11 years of age and a schoolboy. The injury occurred at about 12:30 P. M., during the noon hour. After dinner, he left his home to go to school. This wreckage was not in the line of travel to reach the school. He therefore did not need to come this way to reach the school. The wreck was about three blocks from the school. There was no railing or guard around the wreck, and no one there to keep persons from approaching the wreck. There is no evidence that anyone connected with the company knew of this bent rail. There is evidence that, for many years, the public traveling on foot had made a beaten pathway by the place where this wreck was lying; that plaintiff had, prior to this time, used this path in carrying dinner to his father at some point beyond, not disclosed; that he was not using the path at this time for the purpose of travel; that he had come to the wreckage out of curiosity alone, and for the purpose of viewing it. We are asked, under this record, to say that the defendant knowingly permitted a dangerous instrumentality to be or remain upon its right of way; that the thing was, as left, in and of itself, of such an attractive character that it would appeal to the sportive and playful instincts of children, and draw them to it; that the defendant, as a reasonably prudent person, knew or should have known this, and that, upon their coming, their safety would be imperiled. It is the law that, if one is a trespasser upon the property of another, the owner owes him no duty until he is discovered there and in a place of peril. Then his duty to him begins, and this duty is to exercise reasonable care, after discovering him, not to inflict injury upon him. Even an infant upon the premises of another

as a mere trespasser, without leave or license or invitation, without the knowledge of the owner, cannot complain of injuries received while there, unless the injuries can be traced to some active negligence on the part of the owner of the property after discovering his presence. See *Burner v. Higman & Skinner Co.*, 127 Iowa 580, in which it is said:

"Neither the owner nor the occupant of property is bound to keep it in such condition as that no one may be injured thereby. Liability is predicated only on failure upon the part of the party charged, to perform some duty which he owes to the one who is injured. If one, therefore, goes upon premises without invitation, express or implied, the owner or occupant thereof is under no duty to look out for his safety; and, if he is injured while there without lawful right, or as a bare licensee, no recovery can be had"—citing Thompson on Negligence, Secs. 946, 1075.

The general rule also is that a bare license to use the premises of another, for the sole purpose and benefit of the licensee, imposes no obligation upon the owner to keep the premises in a safe condition for the use of such licensee. He takes it as he finds it; and, if injured by conditions there existing at the time that he assumed to exercise his license, he cannot complain. See, also, *Brown v. Rockwell City Canning Co.*, 132 Iowa 631. In this last case it is said, speaking of the plaintiff:

"There was no invitation to him to be in the annex for the purpose of husking corn, for there was no corn there to husk. It is unquestioned that he and the other boys were there out of idle curiosity, and, while their presence there may not be necessarily imputed to them as a fault, it did not impose on the defendant any particular duty to look out for their safety, in the absence of reasonable knowledge or anticipation that their safety would be imperiled by the maintenance and operation of its machinery. We find nothing in the record to indicate that the superintendent of the defendant, or that Harrison, the representative of the Globe Company, or the

employees assisting in the installation of the machinery, had any knowledge that the boys were playing about the machinery or doing any acts with reference to it which involved them in any peril. The boys were, as already suggested, in the building, not in pursuance of any implied invitation, but for their own purposes, and no duty arose with reference to them until the employees of defendant had some reason to anticipate that they would be endangered by the operation of the machinery. In determining this question, it is entirely immaterial to consider whether the boys were *sui juris* or not, for the inquiry is not as to the ability and capacity of the trespasser, but rather the duty of the one who is charged with the negligent acts."

In *Thomas v. Chicago, M. & St. P. R. Co.*, 93 Iowa 248, the person alleged to be injured was a boy about three years and ten months old. He was playing upon an open, uncovered bridge, located on defendant's main line road. The child went upon the track and the bridge and was in plain sight of the station and at all points along the road leading from the station to the place of the accident. The defendant's employees, with knowledge that children were upon the track, started the train, the engine running backward and with a pilot attached. In disposing of the case, the court said:

"If they were trespassers (meaning the children), then the company owed them no duty until its employees actually saw them upon the track, and in a place of danger. Then, and not till then, did any active duty, on the part of defendant's employees commence. It has long been the established rule in this state that a railroad company is not required to keep a lookout for trespassers, and that it is not negligent in failing to discover them upon its track. This is an undoubted rule, sustained by an unbroken line of authorities."

The court further said:

"There is no question of contributory negligence on the part of the child in this case. The infant was of such tender years that it was not *sui juris*, and . . . as a matter of

law, it should be held it was not guilty of contributory negligence in going upon the track. . . . In determining this question of duty, it is entirely immaterial whether the trespasser is *sui juris* or not, for the inquiry is not as to the ability or capacity of the trespasser, but rather the duty of the one who is charged with the negligent acts. For this reason, the better considered cases hold that it is entirely immaterial that the trespasser is an infant, idiot or lunatic, in determining whether he was a trespasser."

The court further said:

"In order that we may not be misunderstood, it is perhaps well to say that there is an apparent exception to the general rule above stated in what are known as the 'turntable cases,' but we think the exception is not, in fact, an exception, but rather an extension of the principle to cover a different state of facts. In the turntable and other like cases, the defendants are held liable because the nature of the machine or agency which caused the injury, was such as was well calculated—was of such a nature, and left in such a position, as that it was likely—to attract children. The temptation thus presented to children is, in the cases just referred to, made to take the place of an express invitation to an adult, and with much reason."

In *Wendt v. Inc. Town of Akron*, 161 Iowa 338, particular point at page 345, this rule is recognized. It is said:

"The general rule doubtless is that an owner of premises owes to a licensee no duty as to the condition of such premises, save that he should not knowingly let him run upon a hidden peril, or wantonly cause him harm"—citing *Gwynn v. Duffield*, 66 Iowa 708, 713; *Thomas v. Chicago, M. & St. P. R. Co.*, 93 Iowa 248; *Connell v. Keokuk Electric R. Co.*, 131 Iowa 622; *Brown v. Rockwell City Canning Co.*, 132 Iowa 632, 637; *Anderson v. Ft. Dodge, D. M. & S. R. Co.*, 150 Iowa 465, and in that case it is said: "These cases involve the question as to the use of dangerous premises and whether the persons

injured thereon were trespassers, bare licensees, or licensees by invitation. In the *Connell* case, a boy was injured by an electric wire, and the court instructed the jury that if the place where the plaintiff was injured was resorted to by persons generally, of which the defendant had knowledge, then it was the duty of defendant to exercise ordinary care to prevent danger, and a failure to exercise such care would constitute negligence. This is on the theory that plaintiff was more than a bare licensee."

See *Herzog v. Hemphill*, (Cal.) 93 Pac. 899.

These rules, however, are subject to the modification that, in case of an infant,—one of tender years and not capable of using judgment and discretion,—one may be liable if he exposes upon his premises, at a place where he knows children are in the habit of congregating and playing, a dangerous instrumentality or pitfall. This rests on the thought that, with the knowledge of the fact that children are congregating there and engaged in playing, connected with the further fact that they are too young to have judgment and discretion and appreciate dangers even when exposed, he is guilty of a culpable wrong in allowing the things to exist in such proximity to the playground. All reasonably thoughtful and prudent men know, or must know, that children are liable to be injured by instrumentalities or places so left. The bare license doctrine does not always apply to infants. This exception, however, does not apply to the case at bar; for there is no evidence here that the children were in the habit of playing in the vicinity of this wreck, or of congregating there, or that defendant had any notice or knowledge of any such condition as would bring it within the rule.

There is no actionable negligence involved in the wrecking of this train, nor in the tearing up of the track, nor the bending of the rail. These, so far as the record discloses, were the result of unavoidable casualty. But whether the wrecking of the train was the result of carelessness or negligence on the part of the defendant company is wholly immate-

rial, for the reason that, in the wrecking of the train, it violated no duty that it owed to the plaintiff or to the public. The gravamen of the complaint is that, after the train had been wrecked and these two cars thrown from the track, and the rail bent in the position in which it was found, the defendant was guilty of actionable negligence in permitting it to remain so, unguarded and unprotected. These were ordinary box cars thrown from the track upon defendant's right of way and left there. There is no complaint, nor is there any evidence, that these cars, in and of themselves, as left there upon the right of way, were left in any position to suggest peril to anyone who approached them, or passed along the path in the vicinity of them. There is nothing to indicate that the position of the cars suggested any necessity for a railing or guard to protect the public or anyone passing in this path from injury. The only complaint is that one of the rails of the track had been bent in the wreck so as to extend upward and outward; one end fastened by spikes to the ties, and the other end concealed under the cars or wreckage. There is no evidence that anyone in the employ of the company knew of this bent rail, nor was there anything shown which would suggest, from the nature of the wreck, that they should have known of the existence of this bent rail, or that the condition in which it was left involved danger. In fact, the record discloses that the rail had remained in the position in which it originally was for three hours before the accident; that it remained in that condition unchanged, until some parties, whose names are not disclosed, came along and interfered with it. The record is that two men came along and put their hands upon it. What they did when they put their hands upon it, is not disclosed, but it is apparent that it was loosened and sprang from its fastening and injured the boy.

There was nothing in this wreck and in the condition in which it was left that brings it within the rule of attractive agencies likely to draw to it children for the purpose of play, or that would appeal to the sportive and playful nature of a

child. So far as this wreck was concerned, so far as any knowledge of it is traced to the defendant, it was an inanimate piece of matter, thrown in a pile upon defendant's right of way, with none of the characteristics of the toy, and was on defendant's own premises. No childish instincts were called into life by its presence. The instinct of curiosity is an instinct in all human beings, whether mature or immature. There was nothing to suggest danger to one who came to the place of the wreck; and, if it could be said that there was, it is not shown to have come to the knowledge of the defendant company. It was not placed there by the defendant for its purposes, nor can any actionable wrong be imputed to the defendant for its being there. The whole doctrine of attractive nuisance seems to rest upon the thought that the defendant is liable if he knowingly places in an exposed position, and at a place where children are likely to congregate, a dangerous instrumentality; and this liability rests on the further thought that he is bound to know, appreciate and understand the natural instincts of the child to play, and that it will be attracted by such agencies and drawn to it by this subtle influence. Therefore, when he sets in active motion these childish instincts, he is bound in law to guard the child against injury which may come to it in following the promptings of its childish nature. Thus, if the child is attracted across the boundary of defendant's line by a dangerous and attractive thing placed, kept or maintained upon his premises, he owes a legal duty to the child to guard it against injury therefrom; since, by so placing and leaving it, he invites the child to come. His liability rests upon the thought that he has exposed a thing of danger in an open place accessible to a child. He has clothed it in attractive garments which appeal to the childish mind. He is charged with liability because of the imputed knowledge of the habits of children to use a thing so temptingly presented as a plaything, and he is liable because he has invited the child, by his conduct, to amuse itself with the thing left so dangerously

exposed. This is the basis of the claim upon which the defendant is charged with liability as for negligence in a suit for injuring a child, where, if the person injured had been an adult, no liability would attach.

We do not mean to depart from the rule in which it is held that liability attaches where a party leaves upon his own premises a thing of danger, when he knows that children are accustomed to come upon his place for the purpose of play, even though not attracted by any instrumentality placed there by him. That presents another phase of the law, which is well recognized. We are dealing now with the liability which is found to rest upon what is known as the law of attractive agencies. The law clearly distinguishes between children too young to have judgment and discretion, and those who are old enough to exercise their faculties. In all cases, even of trespass, the tender years of the child are subjects for consideration, both when we consider the conduct of the child and the cause from which the injury arose.

In all cases, the law is careful for the safety of human life, and to protect children of tender years from injury. But the extent of this solicitude does not remove the protection of the law from others. Even entertaining the highest consideration for the safety of the child, and imposing upon others the duty to exercise care for its protection, we cannot overlook the fact that the defendant in this case is not shown to have been guilty of any actionable wrong in what it did, and, though the action is a sad one, we cannot hold the defendant liable, without proof of actionable wrong on its part. The showing here did not impose upon the defendant a duty to guard this wreck, and there is nothing in the wreck itself that any ordinary mind could conceive to be attractive, or an invitation to children to come and play. There is nothing in it which could serve as an invitation to this boy to come and use it for any childish reason. It is not shown that the company had any knowledge that it was in the least dangerous, even to a child invited there. It had remained but a few hours.

The child came as an idle spectator, prompted by the curiosity that led others there to view the wreck.

We find nothing upon which to rest liability, and in this conclusion we rest our holding that the case ought to be and is—*Affirmed*.

LADD, PRESTON and SALINGER, JJ., concur.

IN RE ESTATE OF EDWARD A. OLDFIELD, Deceased.
NANCY BOWIE, Appellee, v. WM. TROWBRIDGE, Executor,
Appellant.

TRIAL: Instructions—Applicability to Pleading—Pleading Express

- 1 **Contract—Recovering on Implied One.** In an action to recover against the estate of a decedent *on an express contract* for services, an instruction that “direct evidence of such agreement is not necessary if, from all the facts and circumstances appearing in evidence in the case, you can find by a preponderance of the evidence that there must have been such an agreement,” is not subject to the vice of allowing a recovery on an *implied* agreement, especially when the jury was otherwise told that claimant must recover, if at all, on proof of an express agreement.

EXECUTORS AND ADMINISTRATORS: Claims—Services as Mem-

- 2 **ber of Family—Instructions—Assumption of Facts.** In an action to recover against the estate of a decedent on an express contract for services, which contract was denied, instructions reviewed, and *held* (a) not to assume that the record showed evidence of such express agreement, and (b) to properly present defendant’s claim that the home, food and clothing furnished claimant by decedent fully compensated her for all services rendered, and that the agreement contemplated that one should be in satisfaction of the other.

LIMITATION OF ACTIONS: Current Account—Services for De-

- 3 **cedents.** Claims for services rendered for decedent, and continuously during a series of years, accrue on the date of the last item of the account. (Sec. 3449, Code, 1897.)

MARRIAGE: Breach of Promise—Subsequent Incurable Disease—

- 4 **Effect.** One may, without rendering himself liable in damages, refuse to consummate a contract of marriage when, at the time the contract is entered into, but unbeknown to him, he was af-

flicted with a fatal and incurable malady, of such nature that marriage would, to a reasonable certainty, aggravate it and hasten his death, and thereby defeat all consideration for the contract to marry. So held where the disease was pernicious anemia.

EVANS, C. J., and SALINGER, J., dissent.

PLEADING: Amendments—Amendments After Reversal—Discretion of Court. Amendments raising new issues may be allowed, even after a reversal on appeal.

Appeal from Carroll District Court.—M. E. HUTCHISON,
Judge.

THURSDAY, MARCH 23, 1916.

ACTION for damages for breach of promise of marriage, and for services rendered decedent during his lifetime. Both parties appeal.—*Affirmed* on both appeals.

Chas. C. Helmer, for appellant.

Brown McCrary, for appellee.

GAYNOR, J.—I. The controversy in this suit is based on two claims, filed against the estate of Edward A. Oldfield, deceased. The plaintiff states her causes of action in two counts. In the first count of her petition, she seeks to recover damages for a breach of promise of marriage. In the second count, she seeks to recover for personal services rendered by her to decedent during his lifetime. It appears that Edward A. Oldfield died on December 2, 1910, testate; that his will was duly admitted to probate, and Wm. Trowbridge, defendant herein, was appointed executor of the will. On the 11th day of January, 1911, the appellee (plaintiff) filed a claim against the estate, wherein she asks \$10,000 on account of a breach of promise of marriage which she alleges was made between her and the decedent. In the second count, she claims \$3,975 for services rendered by her for decedent from September 14, 1893, to September 2, 1910. To the first count of plaintiff's petition, based on an alleged promise of marriage the defendant interposed the following defenses: First, that

any agreement of marriage entered into was, by mutual consent of the parties, postponed and deferred from time to time up to the death of Edward A. Oldfield; that consummation of the agreement was prevented by said death; second, that, at the time the alleged breach of promise occurred, if any, the said Edward A. Oldfield was suffering from an incurable disease, known as pernicious anemia, which made it impractical and impossible for him to consummate a marriage with the plaintiff; that any marriage at that time would have aggravated said disease and shortened his life; that the incurable character and disastrous consequences of the disease were unknown to Oldfield at the time of the alleged promise; third, defendant pleads the physical condition of Oldfield in mitigation of damages. To the second count of plaintiff's petition, based on the claim for services rendered, the defendant pleads: first, that all of said claims and demands which accrued prior to five years before the filing of the claim are barred by the statute of limitations; second, that, during the time claimed for services rendered, the plaintiff was a member of decedent's family, receiving support therein as a member of the family; that, during all the time that plaintiff and her five children resided with Oldfield, she and they were furnished with food, clothing and other necessities of life in decedent's family; that Oldfield received no pay therefor except from the services rendered by the plaintiff and her children; that the necessities furnished were at least of the value of the services performed; and that she was fully compensated therefor by such support and maintenance; that, at the time plaintiff resided in the family of Edward A. Oldfield, the defendant avers that the said Oldfield believed that the services rendered by the plaintiff during such time were gratuitous, and were rendered by the plaintiff and received by Oldfield without the expectation on the part of either that payment should be made therefor. In addition to the foregoing defenses, the defendant pleads a general denial as to all matters alleged by the plaintiff in her respective claims.

Upon the issue thus tendered, the cause was tried to a jury, and a general verdict returned for the plaintiff for \$3,164. The jury found, however, specially that the plaintiff was not entitled to recover on the first count of her petition for the breach of promise of marriage. A judgment having been entered upon the verdict, both parties appeal. The defendant, having appealed first, is designated as appellant, and the plaintiff as appellee, when referred to hereafter in this opinion.

As defendant first appealed, we will give our attention first to a consideration of the claim based upon the second count of the petition, upon which the jury allowed plaintiff to recover.

In this count of her petition, she seeks to recover for services rendered, and alleges that, in the year 1893, Edward Oldfield lived on a farm in Sac County; that, at his instance and request, and by express agreement, this plaintiff came to his place to work; that, in 1894, she brought her family with her, consisting of five children; that she continued to work for him from September, 1893, to September, 1910, except when temporarily away on a visit; that the reasonable value of her services, during all the time, was \$5.00 a week; that her work consisted of household duties, work and labor in the house, and manual labor upon the farm. The plaintiff further alleges that payments were made to her from time to time during said period.

The first alleged error relied upon by the defendant for reversal is based on the action of the court in giving Instruction 25 to the jury, on its own motion. The theory upon which the error is predicated is that the plaintiff's petition seeks to recover for services rendered under express contract, while this instruction, it is claimed, authorizes her to recover on an implied contract.

1. TRIAL: instructions: applicability to pleading: pleading express contract: recovering on implied one.

A mere statement of what the instructions contain is sufficient to negative appellant's contention. The

court recognized the fact that the plaintiff predicates her right to recover upon an express agreement, and denied her right to recover except upon proof of such express agreement. The court said:

"The plaintiff alleges that she went to work for decedent under an express agreement that she should do so. Direct evidence of such agreement is, however, not necessary, if, from all the facts and circumstances appearing in evidence in the case, you can find by a preponderance of the evidence that there must have been such an agreement."

The court, in the instruction complained of, simply told the jury that the agreement alleged could be proven by facts and circumstances, as well as by direct evidence. Many facts about which there is controversy are so proven. The mouths of both parties to this controversy were closed; one by death, and one by operation of law. That there was, or was not, such an agreement as she alleged, was a substantive fact to be proven, as the court says, by direct evidence, or by facts and circumstances appearing in evidence,—not necessarily by direct evidence. If the facts and circumstances proven established in the minds of the jury a belief in the existence of the controverted fact, then the fact itself was proven, even though there were no direct evidence of its existence.

That a party cannot recover upon an implied contract where he pleads and relies upon an express contract, is elementary. No rule is more familiar to the profession than the one which requires a case to be tried upon issues made in the pleadings. No ultimate fact, not pleaded, can be considered in determining such liability.

This rule was recognized on the former appeal of this case, 158 Iowa 98, 100, in which it was said:

"Direct evidence of such an agreement for employment is not necessary, however. If from all the facts and circumstances appearing in the case it can fairly be said that there must have been such an agreement, it is sufficient."

In the 28th instruction given to the jury, the court expressly said:

"In this case, plaintiff cannot recover anything for her services . . . unless she has established . . . that such services were rendered by her, under and by virtue of an express agreement with Oldfield for the performance of the same."

It is next contended that the court erred in giving the 28th Instruction, for the reason, as it is said in argument, that the instruction assumes that there is evidence of an express agreement, and that such agreement

2. EXECUTORS
AND ADMINIS-
TRATORS:
claims: serv-
ices as mem-
ber of family:
instructions:
assumption of
facts.

did not contemplate payment for such services by furnishing plaintiff with a home, food, clothing, etc., for herself and family. This instruction must be read in connection with

instruction 26 and 27, immediately preceding, in order that its full import and purpose may be understood. The contention of the defendant was, that the plaintiff was a member of decedent's family; that the labor performed was performed by her as a member of the family; that there was no reasonable expectation on her part, of receiving pay, and that there was no expectation, on his part, of compensating her for the services; that in no event could she recover for services rendered, in the absence of an express contract such as alleged by her in her petition.

The 26th and 27th instructions given are as follows:

"Where one person performs services for another, and the other furnishes a home, food and clothing for the first, a presumption arises that neither expects to pay or receive compensation. If, therefore, you find by a preponderance of the evidence that plaintiff did perform services for Oldfield, and Oldfield furnished a home, food and clothing to the plaintiff, and if you further find that the plaintiff has not shown by a preponderance of the evidence that Oldfield agreed or expected to pay her for her services, then the plaintiff is not

entitled to receive anything therefor, and your verdict should be for the defendant on this branch of the case.

"If you should find plaintiff to have been living with decedent as a member of his family and receiving support therein, a presumption would arise that such services as rendered by her were gratuitous, and the plaintiff must overcome this presumption in order to entitle her to recover for such services, by showing by a preponderance of the evidence that such services were rendered under an express agreement for the rendering of the same, as heretofore explained to you in these instructions."

Immediately following which is this portion of the 28th instruction, of which complaint is made, reading as follows:

"If she has thus established that such services were rendered by her under and by virtue of an express agreement with Oldfield for such services, and by which she was to be paid therefor, then, in such event, she would be entitled to recover herein for such services even though they may have been rendered at a time when she was furnished a home, food and clothing by decedent, and was living with decedent in his home, and with his family."

The contention of appellant is that the court ignores the claim made by the defendant, that the home, food and clothing furnished plaintiff fully compensate her for all the services rendered, and that the agreement contemplated that one should be in satisfaction of the other. We do not construe the instruction as so holding. In the 21st instruction given by the court, the jury was expressly told that one of the defenses is that plaintiff has been fully paid for such services by reason of payments made to her by decedent, and by reason of food, clothing and necessities furnished her and the members of her family, and said to the jury that they should determine from the evidence whether this contention was true or not, and should consider all the evidence, the circumstances under which the services were rendered, and the supplies furnished, and the extent of the same, and what services,

if any, were rendered by the children, in determining this question.

It is next contended that this record discloses such a state of facts that all of plaintiff's claim, prior to five years immediately preceding the filing of the claim,

3. LIMITATION OF
ACTIONS: cur-
rent account:
services for
decedents.

was barred by the statute of limitations.

This question was before the court on the former appeal, and the evidence on this point was substantially the same as in this record. This court said:

"The evidence as a whole tended to show that the service was continuous for the entire time, up to at least within a year or two of the commencement of this action, with the exception of one or two brief periods when plaintiff was absent on visits, and, such being the case, the statute did not begin to run," citing *Kilbourn v. Anderson*, 77 Iowa 501; *Asher v. Pegg*, 146 Iowa 541.

We think this disposes of this same contention made upon this appeal. See *Hensley v. Davidson Bros. Co.*, 135 Iowa 106.

It is next contended that the verdict is excessive. In this contention, we cannot concur. We may further say that a review of the evidence in this case satisfies us that the verdict on this branch of the case is sustained by it.

We find no reversible error upon defendant's appeal.

II. This brings us to a consideration of plaintiff's appeal, and calls for a review of the record made upon the claim of plaintiff for breach of promise of marriage.

Assuming, for the purposes of this opinion, that the record disclosed a promise of marriage entered into between plaintiff and deceased, substantially as claimed by the plaintiff; assuming that this promise continued to be recognized by both parties as binding upon each; assuming that, in September, 1910, the deceased refused to fulfill his promise and marry the plaintiff; assuming that, at the time of the alleged breach of promise, Oldfield was suffering from pernicious anemia, and that the same was an

4. MARRIAGE:
breach of
promise: sub-
sequent incur-
able disease:
effect.

incurable disease, and that marriage would aggravate the disease and would have tended to shorten the life of the deceased, and that this was not known to Oldfield at the time of the making of the promise, and that the condition arose subsequently to the making of the promise, and that this disease caused his death on December 2, 1910, the question presented is, whether or not such a finding would excuse the conduct of the deceased in refusing to consummate his promise by marriage, and defeat plaintiff's right to recover damages based on such refusal.

The testimony of Dr. Patty is that he was first consulted by Oldfield in February, 1910; that Oldfield then said he had no appetite, was tired all the time and unable to work; that he was easily fatigued, short of breath and unable to sleep well; that he made an examination of him; that he had hemic murmurs of the heart; that his condition was due to a loss of blood elements; that his condition was serious; that he had pernicious anemia; that when he first consulted him, he was pale, and his eyelids showed little color; that he informed Oldfield that his condition was serious; that he saw him on August 3rd of that year; that he had then become weaker and unable to do anything; that he informed Oldfield that his condition was fatal; that he died of pernicious anemia; that, at the time he first consulted him, he was unable physically to fulfill a contract of marriage.

Dr. Kessler testified that the disease of pernicious anemia may last two or three months,—possibly more than a year,—but usually a year is the limit; that, if it appeared in the early part of 1910 that Oldfield had no appetite, was tired all the time and unable to work, was easily fatigued, unable to sleep well and that an examination disclosed hemic murmurs of the heart, and his eyes were pale, and he died September 2, 1910, he would say that he died of pernicious anemia; that, if a man was suffering from pernicious anemia it would have a bad effect on his health to marry and have intercourse; that it would aggravate the disease and shorten his life; that,

in treating pernicious anemia, the patient is advised to refrain from labor, dissipation or excitement,—in other words, take everything as easily as possible and be quiet; that such things would aggravate the disease and shorten his life; that any excitement or exertion would tend to aggravate the disease and shorten the life of the patient; that the disease is debilitating in its character and tends to weaken the vital forces, and, in some cases, impair the mind, and said:

"I would advise a patient suffering from pernicious anemia to avoid excitement and exertion and keep quiet."

The plaintiff, Nancy Bowie, testified that she was away from September, 1909, until April, 1910; that the deceased told her, in February, 1910, that he had been to see a doctor and the doctor told him he could not live. "It was after that time that he told me he would not marry me."

Dollie Sawyer, daughter of the deceased, testified:

"I came back home in April, 1910, because my father wanted me to come back. He said his health was getting very bad. He wanted me to come back and stay with him. I stayed with him until he died. His health was bad during all the summer of 1910 and kept gradually growing worse. I heard him say before Mrs. Bowie that the doctor told him he could not live."

Under the heading, "Propositions of Law Requiring a Reversal," the plaintiff, the cross-appellant, urges but two propositions:

5. PLEADING:
amendments:
amendments
after rever-
sal: discre-
tion of court.

1. "After a case has been tried to a jury upon certain issues and appealed, after reversal, neither party has, as a matter of right, to so amend the pleadings as to raise new

issues."

As a matter of right, perhaps no. As a matter of discretion in the court, yes. The amendment complained of was filed with the consent of the court and for reasons then urged before the court. It was a discretionary matter with the court to allow it or not in this particular case.

2. "Sickness or incurable disease incurred after a promise of marriage, is not ground for releasing him from his agreement to marry."

Upon this second proposition, the authorities are not agreed. Some courts hold that every contract to marry has coupled with it an implied condition that the parties will not endanger life or health in the consummation of the marriage; that, where illness or disease exists in either party to the contract, such as would render marriage dangerous to the life or health of either, a breach of the contract, based on such unavoidable and unanticipated condition, is excusable.

In *Sanders v. Coleman*, (Va.) 47 L. R. A. (O. S.) 581, the Supreme Court of Virginia said:

"It can no longer be doubted that, if the performance of a contract is rendered impossible by the act of God alone, such fact will furnish a valid excuse for its nonperformance, and such a stipulation will be understood to be an inherent part of every contract. This principle, it would seem, should apply with equal force to a marriage contract, the performance of which, owing to the causes subsequently intervening, and altogether independent of any default of the party, might result in consequences disastrous to the life or health of the parties, or either of them. We hold, therefore, that a contract to marry is coupled with the implied condition that both of the parties shall remain in the enjoyment of life and health, and, if the condition of the parties has so changed that the marriage state would endanger the life or health of either, a breach of the contract is excusable," citing *Allen v. Baker*, 86 N. C. 91 (41 Am. Rep. 444); *Shackleford v. Hamilton*, 93 Ky. 80 (15 L. R. A. 531).

The opinion further proceeds:

"In the case at bar the evidence (as to which, in our opinion, there is no real conflict) shows that there was a predisposition in the defendant's family to physical troubles of the kind that had developed with him; that his father had died with a similar disease, and a brother with urinary

trouble; that, after his engagement with the plaintiff and before the time fixed for the marriage, the defendant had, without fault on his part, developed and was suffering with a grave malady, involving the urinary organs, which had continued and kept him constantly under the advice and treatment of a physician, up to the time of the trial; that he had cystitis, with probable inflammation of the urethra, complicated with enlargement of the prostate gland, and that an indulgence . . . would aggravate his disease, and likely shorten his life; and that it would be, not only a wrong and an injustice to the defendant, but also to the plaintiff, for him to marry in his condition of health. Marriage is assumed in law to be for mutual comfort. The condition of the defendant precludes any hope of mutual comfort from cohabitation. On the contrary, an indulgence . . . would aggravate his disease and enhance the chances of a fatal result. . . . Our conclusion upon the law and the evidence is that the defendant acted throughout with good faith, and that the unhappy circumstances in which he found himself justified the alleged breach of his contract to marry the plaintiff."

As supporting this rule, we have *Grover v. Zook*, 44 Wash. 489 (120 Am. St. Rep. 1012), in which the rule laid down in the *Sanders* case, *supra*, was quoted with approval. In this *Zook* case, the defendant was afflicted with pulmonary tuberculosis (commonly called consumption), in an incurable form. The woman sought to recover damages for the breach of the contract. This was interposed as a defense. The sufficiency of the defense was questioned on many grounds, but was sustained on the ground that the consummation of the marriage would endanger not only his life but the life of the woman, and would affect the offspring, if any, resulting from the marriage. It appeared in this case that several members of defendant's family had died of pulmonary consumption.

As recognizing the doctrine expressed in these two cases,

though not directly in point, see *Beans v. Denny*, 141 Iowa 52; *Vierling v. Binder*, 113 Iowa 337; *Trammell v. Vaughan*, 158 Mo. 214 (59 S. W. 79, 51 L. R. A. 854); *Shackleford v. Hamilton*, 15 L. R. A. (O. S.) 531.

In this last case, the defense interposed was that, long prior to any contract of marriage with the plaintiff, defendant had contracted a loathsome disease called syphilis, and was treated for it by skilled physicians until he was pronounced cured; that physicians advised him he was cured, and was in a fit state to marry and could safely do so; that, after this time, and with the belief in good faith that the malady no longer existed, he made the contract with the plaintiff; that, after the engagement to marry, and without any fault on his part, the symptoms of the disease reappeared, and he was advised by physicians that he should not marry; that, prior to the bringing of this action, he made known the fact to the plaintiff. The lower court sustained appellee's demurrer to this contention as a defense, but allowed the plea to go to the jury in mitigation of damages. The Supreme Court said:

"The court below, entertaining the opinion that, as defendant had entered into this marriage contract, he is bound for its breach, although it might have been the duty of appellant, under the circumstances, to decline to execute it, sustained the demurrer to the defense. That the contract was unconditional, and the defendant being able, at the time the promise was made, to perform the contract, he must either execute it, or become responsible in damages for the breach. If such a contract as that of marriage is to be treated in the light of a mere bargain and exchange of chattels between parties competent to contract, then it seems to us there would be but little difficulty in sustaining the action of the court below; but if the agreement, when entered into, is to be treated as creating a status that forms the basis of our entire social system, and in which society has more interest in preserving its purity than the parties to the agreement, it must follow that the defense interposed to appellee's claim for damages

was, in law as morals, sufficient to prevent the recovery. Where the marriage contract is consummated, the parties taking each other for better, for worse, for richer, for poorer, and agreeing to cherish each other in sickness and in health, the fact that the social standing of the one party or the other, or their pecuniary condition, was not as represented, will afford no ground for relief; still, where there is a mere agreement to marry, there may be such a condition of one party or the other, as to health or bodily infirmity, arising subsequent to the agreement, as would authorize either party to decline to enter into the marriage relation; and to hold otherwise would be to place such a contract upon the same footing with sales of mere personal chattels. It is said by Mr. Bishop, in his work on Marriage and Divorce, that 'one after marriage cannot complain of an impediment known to him before; but, if he were ignorant of the existence of the defect, or of its incurable nature, though in himself, he may take advantage of it by suit of nullity. The marriage was a mistake; the ends intended by it cannot be answered.' 2 Bishop, Marriage and Divorce (5th Ed.) Sec. 581. The text books establish the doctrine that without sexual intercourse the ends of marriage—the procreation of children, and the pleasures or enjoyments of matrimony—cannot be attained. The first cause and reason of matrimony, says Ayliffe, 'ought to be the design of having offspring; so the second ought to be the avoiding of fornication. And the law recognizes these two as its principal ends, namely, a lawful indulgence of the passions, to prevent licentiousness; and the procreation of children, according to the evident design of Divine Providence.' 1 Bishop, Marriage and Divorce (5th Ed.) Sec. 322. It is not pretended, nor has it been so adjudged in any court, that a mere temporary disease, or such a change in the physical condition of a party to a marriage contract, after it has been entered into, and without his fault, as would render him less capable of discharging the duties growing out of the marital relation, would be sufficient to justify its breach; but when the party is afflicted with

of health, may nevertheless perform his contract to marry the woman, and so give her the benefit of social position, so far as in his power, though he may be unable to fulfill all the obligations of the marriage state; and it rests with the woman to say whether she will enforce or renounce the contract.' As to the first of these reasons, the question is not whether there is or not an absolute impossibility, but what is the true meaning of the contract; and in this case the contract is of such a kind that one might expect the conditions and exceptions implied in strictly personal contracts to be extended rather than excluded. As to the second reason, it cannot be maintained, except against the common understanding of mankind and the general treatment of marriage by English law, that the acquisition of legal or social position by marriage is a principal or independent object of the contract. Unless it can be so considered, the reason cannot stand with the principle affirmed in *Geipel v. Smith*, (1872) L. R. 7 Q. B. 404, that when the main part of a contract has become impossible of performance by an accepted cause, it must be treated as having become impossible altogether. The decision itself can be reviewed only by a court of ultimate appeal, but it is so much against the tendency of the later cases that it is now of little or no authority beyond the point actually decided, which, for the obvious reasons indicated in some of the judgments, is not at all likely to recur."

In the footnote on page 547, Pollock on Contracts (3rd Edition), it is said:

"In an action by a woman for breach of promise to marry, it is a defense either that the woman has physical defects making marriage improper which, if existing, were unknown to the defendant at the time the engagement was made, or that the defendant himself has such defects," citing *Goddard v. Westcott*, 82 Mich. 180; *Gring v. Lerch*, 112 Pa. St. 244; *Vierling v. Binder*, 113 Iowa 337; *Shackleford v. Hamilton*, 93 Ky. 80; *Gardner v. Arnett*, (Ky.) 50 S. W. 840;

Trammell v. Vaughan, 158 Mo. 214; *Allen v. Baker*, 86 N. C. 91; *Sanders v. Coleman*, 97 Va. 690.

In *Allen v. Baker*, 86 N. C. 91 (41 Am. Rep. 444), the defendant failed to fulfill a contract of marriage upon the ground that he was afflicted with a venereal disease which rendered him unfit for the marriage state. The court, in disposing of the case, said:

"However once doubted, it is now generally conceded that, if the performance of a contract be rendered impossible by the act of God alone, such fact will furnish a valid excuse for its nonperformance; and such a stipulation will be understood to be an inherent part of every contract. It is likewise true that, whenever the main part of an executory contract becomes impossible of performance, from any cause beyond the power of the party to control, it will be treated as having become impossible *in toto*. Why should not the same principle apply to a contract, the fulfillment of which, owing to causes subsequently intervening and altogether independent of any default of the party, can only be productive of consequences disastrous to the parties themselves, and such as may entail misery upon others to come after them."

In discussing the case, reference was made to *Hall v. Wright*, hereinafter more fully referred to. The court said:

"In making that decision, the court treated a contract for marriage as they would any other contract, saying that, though in bad health, the man might, nevertheless, so far perform his contract as to marry the woman, and thus secure to her the status and social position of his wife, and endow her with a wife's interest in his estate; and, if unwilling to do this, he should compensate her in damages for his refusal. We confess that we are not satisfied with this course of reasoning. In the first place, it is not possible to assimilate a contract like this to an ordinary contract for personal services, which, if not capable of being wholly performed, may be partially so; and, in the next place, we believe it to be con-

trary to the understanding of men generally, that the acquisition of property or social position either does or should constitute a main and independent motive and inducement for entering into such a contract. The usual, and we may say legitimate, objects sought to be attained by such agreements to marry, are the comforts of association, the *consortium vitae* . . . ; the gratification of the natural passions rendered lawful by the union of the parties; and the procreation of children. And if either party should thereafter become, by the act of God and without fault on his own part, unfit for such a relation and incapable of performing the duties incident thereto, then the law will excuse a non-compliance with the promise—the main part of the contract having become impossible of performance, the whole will be considered to be so. In Pollock on Contracts, 370 (a book in which the principles of contracts are treated more philosophically than by any author known to us), the decision of *Hall v. Wright, supra*, is referred to, with the remark that it is so much against the tendency of the later cases as to be now of little or no authority."

This case then proceeds to discuss the effect upon the woman and her offspring of consummating such a marriage, because that was the strongest argument to be urged against the consummation of the marriage. We think, however, it is not the only argument.

In *Boast v. Firth*, 4 Law Reports (C. P.) page 1, a master sued the father of his apprentice on his covenants in an apprenticeship deed, in which it was provided that the apprentice should serve him (the plaintiff), during all the term. The defense was that the apprentice was prevented from so doing by permanent illness arising after the making of the indenture. The court held that it must be held to have been in the contemplation of the parties, when they entered into this covenant, that the prevention of the performance by the act of God should be an excuse for nonperformance, and the defense was held good. The court, however, was cited to the

case of *Hall v. Wright*, as supporting the contention that there should be liability, notwithstanding the illness of the apprentice. The court said:

"It seems to me, however, that that case is clearly distinguishable. In the case of a contract to marry, the man, though he may be in a bad state of health, may nevertheless perform his contract to marry the woman, and so give her the benefit of social position so far as in his power, though he may be unable to fulfill all the obligations of the marriage state; and it rests with the woman to say whether she will enforce or renounce the contract."

Robinson v. Davison, Law Rep., Vol. 6, Ex. 269, involved a contract to perform services which no deputy could perform (the defendant was an eminent pianoforte player), and which, in case of death, could not be performed by the executors of the deceased. It was held that, by virtue of the terms of the contract, incapacity either of body or mind in the performer, without default on his or her part, is an excuse for nonperformance; and it seems to be the general holding that, where one is engaged to perform services which he alone can perform, if, by the act of God, he becomes disabled for the performance, he is excusable without damages.

See *Dickey v. Linscott*, 20 Me. 453; *Spalding v. Rosa*, 71 N. Y. 40; *Fenton v. Clark*, 11 Vt. 557; *Green v. Gilbert*, 21 Wis. 401.

This brings us to the only two causes to which our attention has been called holding that sickness does not excuse a refusal to perform a marriage contract. The first is *Hall v. Wright*, decided in 1858. This case was first heard in the Court of Queen's Bench. In that court, the judges were four to three against defendant's contention. The Court of Exchequer Chamber on appeal held against such defense by a vote of three, each judge filing an opinion in support of his contention; thus holding that it was necessary to show, in order to escape damages, that the performance of the contract was impossible, and that, at any rate, the contract should be

so performed as to give the woman the status and social position of the wife, no matter what the condition of the defendant is at that time, provided he is capable of sitting up long enough to have the marriage ceremony performed.

Judge Willes, speaking as a member of the court, said:

"The contract in this case is stated by the plaintiff and admitted by the defendant, to have been in terms an unconditional one. . . . Its performance is not impossible, and it is not enough to show, in answer to an action upon a contract, that its performance is inconvenient or may be dangerous. The delicacy of health, alleged as an excuse, is the man's misfortune, not to be visited, beyond what is inevitable, upon the woman. If either party is to have the option of breaking off the match, it ought to be the woman. . . . If the man were rich or distinguished, and the woman mercenary or ambitious, she might still desire to marry him for advancement in life. I do not sympathize with such a woman, . . . but this is not a question of sentiment. If it were, I might put the case of a real attachment, where such an illness as that stated in the plea supervening might make the woman even more anxious to marry, in order to be the companion and the nurse, if she could not be the mistress, of her sweetheart."

Judge Crowder said:

"It is quite impossible to construe the plea as alleging any physical impossibility to go through the ceremony of marriage, or any physical incapacity to perform the duties of marriage. Whether, if such allegations had existed, they would have afforded any answer to the action, I do not think it is necessary in this case to decide. . . . But I am of opinion that it is no excuse for the breach of a promise to marry, that the performance of the conjugal duties would be attended with danger to the defendant's life."

Erle, Judge, speaking for himself, said:

"The plea alleges that, before any breach of the promise, the defendant was afflicted with a dangerous bodily disease,

which had occasioned frequent and severe bleedings from the lungs, and by reason thereof, defendant was incapable of marriage without great danger to his life. . . . The plaintiff contends that a contract to marry is not subject to implied conditions peculiar to itself . . . ; and that, when the time is come, the woman has a right either to a husband or to damages in lieu thereof; and that the fatal consequence of the marriage to the husband is either immaterial to the wife, or a ground for greater damages; as a widow may get more of her former husband's assets than a wife. But there is no authority to support this view; and there seems to me to be much reason and authority against it. A contract to marry has some peculiar incidents arising from its nature. . . . The principle to be deduced from these cases seems to me to be that a contract to marry is assumed in law to be made for the purpose of mutual comfort, and is avoided if, by the act of God or the opposite party, the circumstances are so changed as to make intense misery, instead of mutual comfort, the probable result of performing the contract. . . . The near approach of death by a fatal disease precludes any hope of personal comfort from cohabitation; and, if death is knowingly hastened thereby, each party, by performing the contract, might incur the criminal guilt of intentionally causing death."

Judge Pollock said:

"Some learned judges think it (a contract to marry) is of the same character as any other contract, and that no terms or conditions can be implied by the law; and that, if it be not performed in the terms expressed, the party failing to perform it must pay damages for the breach of it. Other learned judges think that there are implied conditions or exceptions, and that the matter stated in the plea is one of them; and, therefore, that the defendant cannot be called upon to pay damages for the nonperformance of the contract, . . . under the circumstances which appear on the whole record. It must be conceded . . . that there are contracts

to which the law implies exceptions and conditions which are not expressed. All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them."

Judge Pollock further said:

"I prefer putting my judgment on the ground that there is an implied exception in a contract of marriage, including the state of facts alleged in the plea. . . . The question then is: Is the continuance of health, of such a state of health as makes it not improper to marry, another condition? I am of opinion that it is. There are conditions to be implied (I think) on both sides in such an agreement. . . . By the act of God, the contract has become void. . . . It has been suggested that in such a case the woman may be contented with the society of the man, and that the choice ought to rest with her; that if she be willing to marry, he must marry or pay damages. . . . I think, if the man can say with truth, 'By the visitation of Providence, I am not capable of marriage,' he cannot be called upon to marry, and I think this is an implied condition in all agreements to marry. I think that a view of the law which puts a contract of marriage on the same footing as a bargain for a horse, or a bale of goods, is not in accordance with the general feelings of mankind, and is supported by no authority."

Our attention is called to what is said in Addison on Contracts, the great English authority (11th Edition), Chapter 7, Book 2, page 1315, as follows:

"If, subsequently to the making of a contract to marry, one of the parties by bodily disease becomes unfit for the performance of the most important duty of marriage, the party so unfitted is not thereby entitled to treat the contract as dissolved, the other party still desiring its performance. But the latter may break off the engagement; for, if a man, by disease, accident, or mutilation, becomes impotent, he could

never maintain an action against a woman for refusing to marry him."

The only authority cited in support of the text is *Hall v. Wright*, *supra*, and the statement is practically taken from that case, and adds nothing to the holding of the English court.

Our attention has been called to *Smith v. Compton*, Court of Errors and Appeals, New Jersey, decided June 16, 1902, and reported in 52 Atlantic, page 386. That court said:

"The case of *Sanders v. Coleman*, (Va.) 34 S. E. 621 (47 L. R. A. 581), is more liberal to the defendant, and lays down the rule that where the defendant, after the promise, contracts or develops a disease, without fault on his part, which renders it unsafe and dangerous to his health or life to perform his contract, it will constitute a defense to an action against him. On the contrary, *Hall v. Wright*, 96 E. C. L. 746, maintains that such physical defects cannot be set up in bar to the action. In the case under consideration, the declaration alleges that the promise made was to marry on the 15th day of June, 1900, and both the plaintiff and defendant admit that such was the promise. . . . The promise being admitted, and the refusal to perform at the stipulated time being also admitted, the plaintiff clearly established her right of action. In the case of *Hall v. Wright*, the promise counted upon being to marry within a reasonable time, it might with some plausibility be argued that the defendant's physical condition might be considered in determining whether a reasonable time had elapsed, and, if it had not, there would be no breach proven, and the right of action would not exist."

The court further proceeded:

"This is not a duty or a charge created by law, which the party is disabled to perform without any fault on his own part, but a contract entered into by himself, in which he might have provided against the contingency which he alleges has occurred. The contract is an unconditional one, into which

the defendant cannot read a condition which will defeat it. I agree with the declaration of the majority of the judges in *Hall v. Wright*, that it is not enough to show, in answer to an action upon the contract, after breach, that its performance is inconvenient or may be dangerous. Impossibility to perform will alone constitute an absolute bar. Ill health is the defendant's misfortune, not to be visited, beyond what is inevitable, upon the plaintiff. If the plaintiff was willing, in view of his social position, or that which she might acquire by reason of his wealth, to marry him, and await his restoration to health, she had the right to insist upon the benefit of the unconditional contract. If he was apprehensive of danger to his health or life, he could break the engagement, but was subject to such damages as a jury would award against him for the breach. That would, in effect, be a substituted performance in discharge of the obligation incurred. This is in consonance with the well-established rule which governs contracts, and, unless it is adhered to, the loss falls upon the party to whom no fault can be imputed. There was no error in the charge of the court."

The instruction which the Supreme Court approved, so far as this case is concerned, is substantially as follows:

"Nothing will excuse the defendant for a breach of his promise, except such a disease, or complication of diseases, as renders the making of the marriage contract and the consummation of the marriage by marital intercourse, impossible."

These are all the authorities, pro and con, to which our attention has been called, or which we are able to discover upon our individual research.

In the case at bar, the doctors testified that the defendant was affected with pernicious anemia; that one survives this disease usually but two or three months, possibly not more than a year; that, usually, a year is the limit; that defendant had become afflicted with the disease in February, 1910, at least that was the first time it was discovered that he was so afflicted. If the doctor's testimony is to be relied upon (and

there is no evidence to the contrary), it appears that he then had but ten months to live. There is no evidence that he broke his promise of marriage. The plaintiff testifies that he told her in 1910, and after her return in April, 1910, from a visit, that he had been to see a doctor and the doctor told him he could not live; that it was after that that he told her that he could not marry. There is no evidence that the promise was made after he discovered his condition. There is no evidence that he sought to avoid the contract until after it was found that he was stricken with a fatal malady, and that he could not live, by reason of his disease, more than a few months at most. There was no definite time fixed for the performance of the marriage, so far as this record discloses. If the malady had proven fatal before he had informed the plaintiff that he was unable to marry her because of his diseased condition, clearly plaintiff would have no cause of action under any of the authorities. Death would have dissolved the contract. There is in every contract of marriage the implied condition that the parties to the contract will be alive at the time appointed for its consummation.

The consideration for every agreement to marry is found in the consummation of that agreement by marriage. Each has bargained to give and receive, on that day, all that is implied in the marriage relationship—all that grows out of the marriage relationship. If, by the act of God, before the time fixed for the consummation of the marriage, either party is rendered incapable of giving that which the contract calls for, the other party may repudiate the agreement to marry, because of the failure, through the act of God, of the very consideration upon which the promise rests. It may be that the very condition that renders him incapable of giving, renders him wholly incapable of receiving any of the consideration, which, under the consummated contract, he is entitled to. The giving and receiving are mutual obligations. One is a condition for the other. If the woman may repudiate the contract because the man has become, by the act of God, in such a condi-

tion physically as to render him incapable of giving her all that, under the consummated contract, she is entitled to, then the man may, the contract being mutual, refuse to perform when, by the act of God, he has become wholly incapable of receiving any of the consideration to which the consummated contract entitles him. One cannot give to another that which the other is wholly incapable of receiving. We would hold, rather, that the consideration for the original agreement to marry has been destroyed by the act of God, and that what is claimed to be a repudiation of the contract, is simply a communication to the opposite party of the happening of an implied condition in the original contract, which rendered the contract incapable of performance.

Take an extreme case: Two people have entered into a contract to marry on a certain day. All the arrangements are made for marriage on that day. On the day before that fixed for the consummation, the man is afflicted with a mortal wound, or is overcome by a fatal malady. It becomes apparent from the conditions that he can live but a few hours or days. The woman appears at his bedside on the day fixed for the marriage and demands its consummation. Under the rule in *Hall v. Wright*, he must perform, if able to sit up and go through the ceremony and consummate the marriage; and this, that she may receive some of the benefits of the contract, although he is totally incapable of receiving anything in return. If he failed to respond to her request, his estate is mulcted in damages, though he died within two hours after the demand.

Reversing the tables, we take the case of a man in the full vigor and strength of his manhood, promising to marry a wealthy widow, vigorous and strong at the time of the promise, who, on the day fixed for the marriage, is stricken with a fatal malady from which there is no hope of recovery. There is left her but a few days or weeks in which to live. On the day fixed, he appears and demands the consummation of the marriage. She tells him she is unable to marry

because of her fatal malady. However, she is able, at the particular time, to go through the form and ceremony of marriage, though in it is involved great peril to her life. She refuses to consummate, and her estate becomes liable to him in damages. If consummated, he is placed in a position to receive a large portion of her estate. She receives nothing in the consummation of the marriage but the hollow mockery of an empty ceremony. If the rule in the *Wright* case is adopted out of a chivalrous regard for the woman, it is thus seen that it may fail in its application.

This, we think, is the logical effect of the full application of the doctrine in *Hall v. Wright*, as followed by the New Jersey Court of Appeals. We are not inclined to follow these authorities.

We take from these authorities, based, as we think, on sound reasoning:

First, that one may repudiate an agreement to marry, when, subsequently to the making of the contract, he becomes afflicted with a loathsome disease, which, upon the consummation of the marriage, may be communicated to the spouse and to the offspring born of said marriage.

Second, when, after the making of the contract to marry, he becomes afflicted with a fatal and incurable malady, and the consummation of the marriage would hasten his death, he is not bound to perform by consummating the marriage, and therefore is not liable in damages for such failure. Or, in other words, that there is implied in every contract to marry that the parties will not endanger life or health in the consummation of the marriage; and that, where illness or disease comes upon one after making the contract to marry, such as would render marriage dangerous to his life, a breach of the contract, based on such unavoidable and such unanticipated condition, is excusable. We do not mean by this that the danger should be simply problematical, or a possible contingency—one that may or may not be a resultant conse-

quence of the act of consummating the marriage—but one which the evidence renders reasonably certain is the inevitable consequence of such an act. Where the malady is of such a fatal character that he cannot enter into the marriage relation and receive any of the benefits which grow out of and are involved in the relationship established by the consummation of the marriage, he is excused.

Third, that, where one is stricken, before the time arrives for the consummation of the marriage, with a fatal malady, and has but a few days or weeks or months to live, and the evidence makes this reasonably certain, he is excused from the consummation of the marriage, and, being excused, his estate, upon his death, is not liable in damages for such failure.

These are implied conditions in the agreement to marry, and the agreement to marry is voided by their happening, and, the agreement being void, no liability for damages results from the failure to perform. The first proposition rests upon public policy, as well as upon the conditions herein suggested.

In the instant case, the evidence discloses without question that, before any time was fixed for the final consummation of this agreement to marry, the defendant was afflicted with a fatal malady—a knowledge of which came to him before any suggestion was made by him to the plaintiff of any disposition on his part to withdraw from the performance of the contract and the consummation of it by marriage; that the malady was of a progressive character; and that he died soon after his conversation with the plaintiff in which she claims he breached his promise to consummate the marriage. Under the facts in this case, we are satisfied that the plaintiff has not shown a right to recover for the alleged breach of promise of marriage, and, on this issue, the case must also be affirmed. —*Affirmed* on both appeals.

DEEMER, LADD, WEAVER and PRESTON, JJ., concur.

EVANS, C. J., SALINGER, J., dissent as to Division II.

SALINGER, J. (dissenting).—While being afflicted with a loathsome venereal disease is suffered to be a complete defense to breach of promise, it has been understood always that this rests on a narrow exception engrafted upon the law of contracts; understood that such exception is not worked by tenderness to the defendant, but by reasoning that it will be a less evil to permit him to take advantage of his own wrong than to press him into a marriage which will offend public policy. The majority has extended the exception to what is not within the reason for the extension—to pernicious anemia, which, while surely fatal, and usually so within a year, is neither infectious, contagious nor transmissible. This exception is not enlarged on considerations of public policy, but on the ground that, if performance of a contract will be injurious to one party to it, neither performance nor damages may be exacted of him. In my opinion, this violates both reason and authority. *Cessante ratione legis, cessat ipse lex*, is disregarded. It, therefore, is not surprising that the opinion of the majority proves to be much more a strenuous effort to find reasons for a desired conclusion than the statement of a conclusion compelled by reasoning.

In Broom's Legal Maxims (7th Ed.), *page 251, it is said:

“To a declaration for breach of promise of marriage, a plea that after the promise, and before breach, the defendant became afflicted with disease, which rendered him ‘incapable of marriage without great danger of his life and, therefore, unfit for the married state’ was recently held bad, in accordance with the general rule that a man who has voluntarily contracted shall either perform his contract or pay damages for breach of it, the plea, moreover, not showing an impossibility of performance.”

Addison on Contracts, the great English authority, at page 1315 (11th Ed.), says:

“If, subsequently to the making of a contract to marry, one of the parties by bodily disease becomes unfit for the per-

formance of the most important duty of marriage, the party so unfitted is not thereby entitled to treat the contract as dissolved, the other party still desiring its performance. But the latter may break off the engagement; for if a man, by disease or mutilation, becomes impotent, he could never maintain an action against a woman for refusing to marry him."

For this, he cites *Hall v. Wright*, El. Bl. & El. 746, decided in Exchequer Chamber, reversing a contrary decision below. This case fully sustains the text. In it, the following plea was held to present no defense:

"That defendant after the promise and before the breach, became afflicted with disease occasioning bleeding from the lungs, and by reason of such disease became incapable of marriage without great danger to his life, and, therefore, unfit for the marriage state."

Willes, J., in speaking of the contract, said:

"Its performance is not impossible; and it is not enough to show, in answer to an action upon a contract, that its performance is inconvenient or may be dangerous. The delicacy of health, alleged as an excuse, is the man's misfortune, not to be visited, beyond what is inevitable, upon the woman. If either party is to have the option of breaking off the match, it ought to be the woman. The court has no right to say what is best for her. If the man were rich or distinguished, and the woman mercenary or ambitious, she might still desire to marry him for advancement in life. I do not sympathize with such a woman, if any there be, but this is not a question of sentiment. If it were, I might put the case of a real attachment, where such an illness as that stated in the plea supervening might make the woman even more anxious to marry, in order to be the companion and the nurse, if she could not be the mistress, of her sweetheart."

Crowder, J., said:

"But I am of opinion that it is no excuse for a breach of promise to marry, that the performance of the conjugal

duties would be attended with danger to the defendant's life. Such a state of illness may make it matter of the greatest prudence on his part to break his contract, and to pay such damages as a jury may award against him for the breach. But, in my opinion, it is no legal answer to the action."

Boast v. Firth, relied on by the majority, so far from sustaining the opinion, is affirmatively against it. It says (4 L. R. 4 C. P. [1868], at page 8):

"In the case of a contract to marry, the man, though he may be in a bad state of health, may, nevertheless, perform his contract to marry the woman, and so give her the benefit of social position so far as in his power, though he may be unable to fulfill all the obligations of the marriage state; and it rests with the woman to say whether she will enforce or renounce the contract."

Hall's case was expressly approved in *Smith v. Compton*, (N. J.) 52 Atl. 386. There the contention was that defendant had a complete defense because, without his fault, he, after promise, contracted or developed a urinary disease which kept him under treatment, and which would be aggravated by sexual intercourse and thus be an imminent hazard to his life.

On appeal, Justice Van Syckle said:

"I agree with the declaration of the majority of the judges in *Hall v. Wright*, that it is not enough to show in answer to an action upon the contract, after breach, that its performance is inconvenient or may be dangerous. Impossibility to perform will alone constitute an absolute bar. Ill health is the defendant's misfortune, not to be visited, beyond what is inevitable, upon the plaintiff. If the plaintiff was willing, in view of his social position, or that which she might acquire by reason of his wealth, to marry him, and await his restoration to health, she had the right to insist upon the benefit of the unconditional contract. If he was apprehensive

of danger to his health or life, he could break the engagement, but was subject to such damages as a jury would award against him for the breach. That would, in effect, be a substituted performance in discharge of the obligation incurred. This is in consonance with the well-established rule which governs contracts, and, unless it is adhered to, the loss falls upon the party to whom no fault can be imputed."

The majority attempts to avoid these direct and palpably sound authorities by stating that the tendency of the "later cases" is against *Hall v. Wright*. The "later cases" consist of the one case of *Sanders v. Coleman*, (Va.) 34 S. E. 621, in which, on identical plea of urinary disease, a conclusion opposite to that of *Smith v. Compton*, *supra*, is reached.

It is sufficient comment upon the *Sanders* case that its only citations are the *Shackleford* case and the *Allen* case.

As to *Shackleford v. Hamilton*, (Ky.) 15 L. R. A. (O. S.) 531, it is the fact, and the opinion itself shows it to be the fact, that it was decided wholly on the ground that the marriage of a syphilitic might have such consequences as that public policy will permit that that disease be urged as a complete bar to a promise to marry. While it, in a way, approves a statement in a dissent by Erle, J., in *Hall v. Wright*, *supra*, an examination will show that even this much, which is said merely *arguendo*, deals with the rights of *the party not breaching*.

While *Allen v. Baker*, 86 N. C. 91, has an abundance of rhetoric and language which, if broadly accepted, makes any disease a complete defense, it suffices to say that it, too, involves "a loathsome disease, incurable in fact, and of such a nature as to render him unfit to enter the marriage relation with anyone;" and that its ultimate conclusion is:

"We cannot understand how one can be liable for not fulfilling a contract when the very performance thereof would in itself amount to a great crime, not only against the individual, but against society itself."

2.

The "support" of the *Sanders* case which the majority marshals, is remarkable. The *Shackleford* and *Allen* cases have been discussed. *Grover v. Zook*, (Wash.) 87 Pac. 638, which the majority thinks supports the *Sanders* case, cites the *Shackleford* case. The *Zook* case itself is decided wholly upon the ground that consumption is a complete defense because it is highly infectious and transmissible, and the ruling, once more, is put wholly upon the grounds of public policy. The only support it affords to the claim of the majority that aggravation of a disease which defendant has would justify his breach of promise is the remark that, "in addition to the thought of progeniture, there would be also that of the aggravation of the disease as to both himself and prospective wife, the medical experts showing that the intimate association of married life would tend to augment the ravages of the malady upon each." To make plain that this is merely incidental argument instead of the decision in the case, it is only necessary to examine the citations, which are *Ryder v. Ryder*, (Vt.) 28 Atl. 1029; *Atchinson v. Baker*, 2 Peake 103, and *Trammell v. Vaughan*, (Mo.) 59 S. W. 79—which last case, the majority relies on affirmatively. It holds that discovery that defendant was afflicted with contagious venereal disease entitled him to postpone the marriage for a reasonable time, whether or not plaintiff, with knowledge of his condition, was willing for the marriage to take place.

Beans v. Denny, 141 Iowa 52, involves the rights of the party *who is not diseased*, and the nearest it comes to touching the case at bar is in its statement that one is excusable for declining to carry out the promise of marriage where the other party is afflicted with an incurable venereal disease, unless the promise was made with knowledge that the other party had such disease. The other cases relied on by the majority are the following, and seem to be utterly irrelevant:

Vierling v. Binder, 113 Iowa 339, is that where the defendant pleads he did not engage to marry because of physical condition of the *plaintiff at the time when it is claimed he did make such engagement*, he cannot show that she had these ailments *at the time of the trial of her action for breach*. *Gring v. Lerch*, 112 Pa. St. 244, holds it to be a valid defense to the action that the *woman was unable to have sexual intercourse*, and, although she promised to submit to a surgical operation to cure the difficulty, refused to do so. All that is decided by *Goddard v. Westcott*, (Mich.) 46 N. W. 242, is that *plaintiff* may be asked, on cross-examination, whether she had told certain persons she had a tumor, for the purpose of showing that she was not capable of making or carrying out the contract at the time inquired into, without fraud or injury to the defendant.

3.

It seems to have been apprehended that the weight of direct case law is not with the opinion, and a labored attempt is made to fortify it with "Act of God" law, and the general principles that govern mutuality of contract and failure of consideration. To make use of the act of God cases, the majority is obliged to assume certain facts erroneously, to make unsound deductions from what is assumed, and to misapprehend what "Act of God" is, in law. To make this plain, one need but point out that the opinion inquires whether death before breach would not be a complete defense, and answers that it would. This is true, but true because all the cases hold that that only is an act of God which makes any performance impossible. Death does that. As to the cases upon which the opinion relies—*Robinson v. Davison*, Law Reports, Vol. 6, Ex. 269, and the cases therein cited (and cited also by the majority), to wit: *Dickey v. Linscott*, 20 Me. 453; *Fenton v. Clark*, 11 Vt. 557, *Spalding v. Rosa*, 71 N. Y. 40, and *Green v. Gilbert*, 21 Wis. 401—each and all of them in some form or other involve the proposition that, if one agree to perform

personal labor or services which cannot be done by deputy, and become too ill to perform, he is excused. Certainly. Where one agrees to do labor and, without fault of his, sickness makes it *impossible* for him to labor, there is a case which is in principle the equal of death. The law on this head is in no confusion. *Dewey v. Union School District*, (Mich.) 5 N. W. 646, 647, and *Gear v. Gray*, (Ind. Appellate) 37 N. E. 1059, declare that the performance of a contract will only be excused as being prevented by the "Act of God" when there are intervening circumstances which render performance impossible, and not when they only make it difficult and undesirable; and hence the suspension of a school by reason of an epidemic of a contagious disease does not defeat the right of a teacher to compensation under his contract.

In *Ringeman v. State*, (Ala.) 34 So. 351, sureties on a bail bond pleaded on a judgment *nisi* that, after the execution, the principal was so ill of consumption that it became necessary to the preservation or prolongation of his life for him to go to another state; and that, at the time a forfeiture was taken, a return could not have been made without serious detriment to his health, nor without imminent danger to his life. It was held a bad plea because it did not aver impossibility of appearance by the principal resulting from an act of God; and that, while his death in such case would have been the act of God in legal contemplation, illness, however severe and critical, is not. In support, the case cites *Cain v. State*, 55 Ala. 170; *State v. Crosby*, (Ala.) 22 So. 110; 3 Am. & Eng. Encyc. of Law 717; *Taylor v. Taintor*, 16 Wall. 366; *Piercy v. The People*, 10 Ill. App. 219; *Devine v. State*, 5 Sneed (Tenn.) 623, and *Scully v. Kirkpatrick*, (Pa.) 21 Am. Reports 62, 64.

Not a case may be found in which *vis major* is applied to anything short of utter inability to perform, at all. That it may not be in the very case at bar is squarely held in Broom's Legal Maxims, Addison's Contracts, Pollock's Contracts, and *Boast v. Firth*, relied on by the majority, and in *Hall v.*

Wright, and *Smith v. Compton*. These demonstrate that "Act of God" has no application where performance is not rendered impossible. To avoid them the majority is forced to reason thus: (1) Act of God is a complete defense because it makes any performance impossible; (2) a fatal disease is an act of God; (3) defendant had such disease; (4) *therefore*, it was *impossible* for him to marry, and he is excused.

It is manifest, the opinion was compelled to assume that his disease made performance by defendant *impossible*. This assumption counters the testimony adduced for defendant, including Dr. Patty, who said: "I do not mean to say he was unable to stand up and go through a ceremony of marriage." It assumes what is contrary to reason and common knowledge, and is against all the authorities that speak to the point, including those upon which the majority relies. See the authorities last referred to. It cannot be conceived how the mere going through the ceremony can have such or much effect on health or life—or though one be in never so parlous a state of health why he is incapable of becoming married.

The majority inquires whether, in the extreme case of a demand for performance, when the other party is immediately to die, and the ceremony involves "in it great peril to life," there should be a recovery. It is an extreme case, and the question might well be answered by asking whether, if death be certain, though a year away, performance would be excused; for the two cases involve nothing but a difference in degree. But even as to the extreme case suggested, it can be said, in the first place, that the going through the ceremony cannot involve great or any other peril to life; that cases do occur in which the man, though mortally wounded and about to expire, has insisted upon giving his name and the right of inheritance to the woman whom he had promised to marry; and that the situation presents no more than matter in mitigation. In such circumstances, the recovery would not be large, but that is no good reason for departing from the sound rules of the law of contracts. Better that recovery should be allow-

able in any case than to disturb salutary elementary rules which prohibit a breach of contract based on the desires or convenience of the one repudiating.

4.

Realizing, no doubt, the weakness of argument based on the "impossibility" or injuriousness of going through the ceremony, it is insisted that marriage means more than being one party to the marriage service, and that marriage is "impossible" whenever one party is unable to respond to all that marriage means or should mean. This reasoning can be supported only by the application of general rules governing mutuality in contracts, or by assuming that the rearing of children is of itself the consummation of marriage, and its sole constituent. This last overlooks consortium, the privilege of bearing the name of the man, of being endowed with his social standing, and of the right of inheritance. Followed to the bitter end, any who are above a certain age may freely breach a contract to marry because there could be no offspring from their marriage. As the opinion itself shows, Pollock declares that impossibility of performance as applied to breach of contract to labor by reason of sickness has no place here, because to apply it would be "against the common understanding of mankind, and the general treatment of marriage by English law according to which the acquisition of legal or social position by marriage is a principal or independent object of the contract," and (Contracts, 3rd Ed., page 546) though defendant may be unable to fulfill all the obligations of the marriage, it rests with the woman to say whether she will enforce or renounce the contract—all of which amounts to saying that there is no impossibility of performance, as the law understands the term, merely because children are impossible. In *Boast v. Firth*, relied on by the majority, it is said that the contract to marry may be performed despite bad health, because the sick man can "give

her the benefit of social position so far as in his power, though he may be unable to fulfill all the obligations of the marriage state." In *Grover v. Zook*, also relied on by the majority, "the thought of progeniture" is treated as but one element, and the defendant is excused, not on that account, but because his pulmonary consumption made the marriage one against public policy. It has already been presented by the illustration of an agreement to marry entered into by very old people, and by death-bed marriages insisted upon by the one dying, that marriage on part of one who is mortally ill is not impossible, and that marriage involves more than children.

5.

The theory of failure of consideration is not persuasive, either. This is the first time it has been invoked *for the one who is unable to furnish full consideration*. It involves a confusion of the parties. The woman might well refuse to marry because the condition of the man was such that his marrying her would furnish no consideration for her promise to marry him. Reversing this leads to the remarkable result that one who has agreed to furnish certain things, and is unable to furnish them, or some of them, may plead a failure of consideration, and say that, because he can furnish only half of what was agreed upon, that then, though the other party is satisfied with half, he need not perform at all, because he cannot furnish all. Such reasoning overlooks that where there may be a part performance, and the one able to perform fully is willing to waive full performance by the other, it does not lie in the mouth of the one who is in default to complain. Take the illness cases before adverted to. There would be a wholly different ruling if one agreed to do copying in an office and also to sweep the office, and it transpired he was too ill to do the sweeping, but able to do the copying, and the employer was willing to accept copying as full performance of the contract. The employer might well

refuse to perform if the other could not do all that was contracted for. But the opinion turns this round, and excuses one from doing what he can do, because it is less than he agreed to do, even though the other party is willing to accept the shortage.

Boast v. Firth, supra, involves inability to perform labor agreed to be performed, because of permanent sickness, and holds such illness to be an excuse; but it distinguishes *Hall v. Wright, supra*, by pointing out that, while the apprentice in the *Boast* case could not perform, on contract to marry, the man, though he may be in a bad state of health, may perform to some extent, and he may not avail himself of his disability, if the woman is willing to accept part performance.

One can understand how, on the reasoning of the majority, a young woman who had agreed to marry an octogenarian might decline performance on the ground that there was no consideration for her promise; but it is beyond me to understand how the old man can interpose such plea to excuse performance on his part, when the other party remains willing.

"Where the malady is of such a fatal character that he cannot enter into the marriage relation and receive any of the benefits which grow out of and are involved in the relationship established by the consummation of the marriage, he is excused," says the majority. And, if "either party is rendered incapable of giving that which the contract calls for, the other party may repudiate the agreement . . . because of the failure . . . of the consideration upon which the promise rests." And, one may "refuse to perform when, by the act of God, he has become wholly incapable of receiving any of the consideration." Is the majority prepared to follow this where it may lead?

If one have spectacles fitted and immediately thereafter become blind, is he excused from paying for the work and the glasses because an act of God has made them of no use to him? Will the amputation of both feet after ordering boots absolve from payment? If one ordered lemons, and,

by the time they reached him in due course of transportation, he found himself suffering from some disease of the throat that would make it agony for him to use the lemon juice as he had intended, it would follow, on the reasoning of the majority, that he could refuse to pay.

6.

The majority says:

"If the woman may repudiate the contract because the man has become by the act of God in such a condition physically as to render him incapable of giving to her all that, under the consummated contract, she is entitled to, then the man may, the contract being mutual, refuse to perform when, by the act of God, he has become wholly incapable of receiving any of the consideration which the consummated contract entitled him to. One cannot give to another that which the other is wholly incapable of receiving."

This overlooks all that has just been said, and holds that, because one who has the right to repudiate chooses to waive that right, the other is thereby authorized to repudiate. So far as the doctrine of the mutuality of contracts is applicable, the cases do apply it. Either may defend on the ground that his or her disease is such that performance would violate public policy. To go beyond this is to apply one of the exceptional rules in specific performance to the case of this contract.

There is a rule in specific performance that one who was himself unable to perform when the contract was made cannot have this particular remedy, even though he becomes able to perform before he brings action. *Luse v. Deitz*, 46 Iowa 205; *Richmond v. Dubuque & S. C. Railway*, 33 Iowa, at 486. Self-evidently, this rule can have no application in any case where the court is without power to compel specific performance. A marriage is manifestly one of the things that may not be compelled by court order. Consequently, that one is not bound to marry a plaintiff who is sick does not make a

law rule that, where plaintiff is willing to marry a defendant, though sick, such defendant may break his contract because he is sick.

If one can conceive the inconceivable case of a promise to marry being brought into chancery on application for specific performance, then, the granting of the relief being discretionary, it might well be that, in a case where performance would entail physical danger to the party in default, the chancellor would use his discretion and relegate the one not in default to some remedy other than specific performance. But here, the essential position of the defendant is that, because it will work an injury to him and him alone,—because, if he kept his promise, the consortium he could give would be of less value than if he were well, therefore the party not in fault is entitled to no relief.

I would reverse on the appeal of defendant.

EVANS, Ch. J. (dissenting).—I am not averse in spirit to the condition imposed by the majority upon the marriage promise. Its reasonableness is that it softens harshness in the enforcement of a contract which, from its very nature, ought to be characterized by tenderness. However, to subject such contracts to such a condition as a continuing and necessary qualification thereof is to declare a measure of disability. This is a purely legislative prerogative, and not a judicial one. In the absence, therefore, of qualifying legislation, I feel constrained to join the dissent as declaring for the recognition of the contract as actually made by the parties.

J. J. BECKER, Appellee, v. INCORPORATED TOWN OF CHURDAN,
Appellant.

EVIDENCE: Parol as Affecting Writing—Custom and Usage—Plead-
1 **ing.** Parol evidence is admissible without pleading to show that, by usage and custom, certain words and phrases employed in a written contract have a special meaning in the business with ref-

erence to which the contract is made. So held as to the clause, "complete piped well," in a contract for the construction of a well.

CONTRACTS: Construction—Province of Court and Jury. When

- 2 controversy exists whether certain words or phrases used in a written instrument have acquired a particular meaning in a particular business, it is proper to require the jury to determine the sense in which such words or phrases were used.

NEW TRIAL: Conduct of Bailiff—Unauthorized Statements to Jury.

- 3 Misconduct of a bailiff without an affirmative showing of prejudice is not ground for a new trial. *Held*, certain jesting remarks of a bailiff to some of the jury as to the time they would be kept together in the absence of an agreement were not sufficient grounds for a new trial.

NEW TRIAL: Conduct of Jury—Unwarranted Discussion. The con-

- 4 clusion of the trial court on conflicting testimony as to whether the jury indulged in unwarranted discussion and statements, or was otherwise guilty of misconduct, is conclusive on the appellate court.

NEW TRIAL: Newly Discovered Evidence—Diligence. Newly dis-

- 5 covered evidence without a showing of diligence in discovering it is not sufficient to justify a new trial. So held where the newly discovered evidence was either from those (a) who were witnesses on the former trial, or (b) who were present on the former trial and referred to by witnesses as having knowledge of the controversy.

NEW TRIAL: Newly Discovered Evidence—Documentary Evidence.

- 6 The discovery of documentary evidence, fully covered by secondary evidence on the former trial, is not sufficient to justify a new trial.

CONTRACTS: Performance—Notice—Oral or Written. Oral notice

- 7 of a matter pertaining to the performance of a contract is sufficient, in the absence of a provision to the contrary.

WITNESSES: Cross-Examination—Limitation. Prejudice may not

- 8 be predicated on a limitation placed on the cross-examination of a witness (a) when the matter excluded was not cross-examination, and (b) when the matter sought to be elicited (assuming it to be cross-examination) was fully brought out at a later stage of the trial.

APPEAL AND ERROR: Parties Entitled to Allege Error—Receiving Evidence Without Objection. Acquiescing in the reception

of evidence precludes subsequent objections to the retention thereof.

Appeal from Greene District Court.—M. E. HUTCHISON,
Judge.

TUESDAY, APRIL 4, 1916.

ACTION against defendant for the contract price or reasonable value of sinking a well for the defendant town. The defense was that the well was constructed under a written contract; that plaintiff did not comply with the terms of this contract or complete a well in substantial compliance with his agreement. Defendant also pleaded that, by special agreement between the parties, a certain phrase used in the contract meant that the well should be piped from top to bottom with standard iron pipe. This was denied by plaintiff, and he specially pleaded that the work was done according to the terms of the agreement. On these issues, the case was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

A. D. Howard and Church & McCully, for appellant.

Seneff, Bliss & Witwer, for appellee.

DEEMER, J.—Although the record is very large, consisting of something like 527 pages of printed matter, the ultimate questions are few in number, and might well have been presented in from 150 to 200 pages.

On the 7th of October, 1912, the defendant town entered into a contract with plaintiff whereby plaintiff undertook to drill and complete a well for the town at a point to be selected by the town. The contract provided:

“Said well to be 8 inches at the top and continued as such until bed rock is encountered, but in no case less than 100 feet, and not less than 6 inches in diameter at the bottom of the well. In case second party is unable to complete said well so specified because having encountered bed rock at not less than 100 feet, but should bed rock be encountered at a

greater depth than 100 feet, then second party shall be allowed to enlarge size of well and pipe to 10 inches in diameter at the top, but in no place less than 6 inches in diameter. Party of the second part agrees to furnish a complete piped well with sufficient water in same that will stand the test of any four-inch cylinder pump with a continual full flow for 10 hours, said pump to be furnished by first party, said test to be satisfactory to first party. Said test to be made by second party, without compensation. Second party agrees to complete well by January 15, 1913, and in case said well is not completed by this date, this contract is null and void, and first party has not obligated themselves to second party. It is further agreed that second party is to furnish all material and pipe except sand point, if one is needed, which is to be placed by second party, and complete well in a workmanship-like manner. All pipe used in the above described well to be standard pipe. First party agrees to pay to second party \$3.25 per lineal foot for the eight-inch well and in case it becomes necessary to enlarge to 10 inches at the top first party agrees to pay \$4.00 per lineal foot when completed and accepted by first party."

Defendant contends that, by reason of a conversation had between the parties before and at the time of the signing of the contract, the term "complete piped well" meant that the well should have been piped from top to bottom with iron piping. This, plaintiff denied. He also claimed that, according to custom and usage and the understanding of the trade, the term used in the contract meant no more than that iron piping should be used where necessary to keep out surface water or seepage, and that piping should not be used in going through solid rock, and that piping such as defendant insists upon would have destroyed the usefulness of the well. It is practically admitted that the well was not constructed according to defendant's contention; and as it was to be drilled and piped according to the terms of a written contract, plaintiff,

in order to recover the contract price, was required to show substantial compliance with the terms of the contract on his part. The trial court correctly instructed that he could not recover on *quantum meruit*; and about the only issue submitted to the jury was the proper interpretation to be given the contract. Appellant's counsel assign 97 errors said to have been committed by the trial court; but they confine their arguments to 8 main propositions. They first say that the contract itself calls for a well completely piped from top to bottom with standard iron pipe, and that the trial court should have so instructed the jury. Abandoning this proposition for the moment, they insist that, by reason of prior and contemporaneous agreements and understandings between the parties, the contract should be so construed, and they introduced testimony to substantiate the contention. Adopting this view, the trial court instructed the jury that it was for it to decide whether or not there was such a prior or contemporaneous understanding or agreement, or whether the defendant was led to believe from the prior negotiations between the parties that the well should be piped from top to bottom, and directed the jury that, if it found either proposition to be true, then the verdict should be for defendant. The plaintiff denied that he said or did anything to lead the defendant to so believe, and also averred that, according to use and custom among well diggers in the locality, the terms used in the contract with reference to iron piping meant no more than that it should be used when and where necessary to prevent the inflow of surface water, caving of the well, etc.; and that a well piped from top to bottom, as defendant claims this one was to have been, would be ineffective and useless. This issue was also submitted to the jury, and defendant's main complaint is that the testimony on these points was inadmissible because plaintiff did not plead usage or custom, and that if it had, such testimony was inadmissible because contradicting the terms of the written agreement.

I. The first proposition which arises on the appeal is the admissibility of oral testimony as to custom and usage and in explanation of the term, "complete piped well," there being no pleading of usage or custom or that the terms used were technical ones having a definite meaning among well borers and diggers.

1. EVIDENCE:
parol as affect-
ing writing:
custom and
usage: plead-
ing.

It will be noted that the phrase, "complete piped well," is not clear to the ordinary mind. What is a complete well, piped? Is it the equivalent of a well completely piped? Surely the terms are not equivalent. One means a complete well piped and the other, a completely piped well. In view of this distinction, it is manifest that the term used may have a technical signification among well diggers due to usage and custom, and that testimony of such usage or custom or terminology may be received, not for the purpose of varying or contradicting the contract itself, but explanatory of the term used and identifying the subject matter of the contract. Such testimony is admissible without being pleaded; and it was competent for plaintiff to show without any pleading that such a construction of the contract as defendant was insisting upon would defeat the very objects and purposes of the well, in that it would prevent the flow of water therein and make it impossible for the well to meet the tests required by the contract itself. There is no real divergence of authority upon the proposition that such usage or custom may be shown, and that it need not be specially pleaded. See *Wilson v. Delaney*, 137 Iowa 639; *Thayer v. Smoky Hollow Coal Co.*, 121 Iowa 121; *Coulter Mfg. Co. v. Fort Dodge Grocery Co.*, 97 Iowa 616; *Wood v. Allen*, 111 Iowa 97; *Sherrwood v. Home Savings Bank*, 131 Iowa 528; *Brody v. Chittenden*, 106 Iowa 524. In *Wilson's* case, *supra*, it is said:

"Passing to the other point, it may be conceded that the expression 'stock cattle' is not one carrying universal meaning in the sense that necessarily there is thereby presented the same thought in the same way to the minds of all men;

but it is matters of uncertainty in the terms, stipulations and conditions of the contract, and not matters of mere definition, that come within the specific performance rule. And where, as here, parties contract with reference to cattle, and in doing so make use of the expression 'stock cattle,' and no mistake is alleged, it must be presumed to have been their mutual intent that their expression should be given the meaning common to the understanding of cattle men in general. And, in such view, it cannot be said that by using the expression the parties have involved themselves in any uncertainty as to the terms, etc., of their contract. The trouble is one of definition alone. And, as related to the situation in hand, upon definition depends no more than the identification of the subject matter of the contract. It follows that there is involved simply an inquiry into the technical or special meaning of the expression used among those who deal in cattle. * * * 'Parol evidence is always admissible * * * in order to connect the description with the thing intended, and thereby to identify the subject matter, and to explain all technical terms or phrases used in a local or special sense.' "

Authorities from other states announce the same rule. *Globe Ins. Co. v. Moffat Co.*, 154 Fed. 13; *Arkadelphia Lum-ber Co. v. Asman* (Ark.), 107 S. W. 1171; *Breen v. Moran* (Minn.), 53 N. W. 755.

If such testimony be offered to add to or subtract from a contract or to vary its terms, and it is not merely explanatory in character, doubtless a pleading is necessary; but not so in such cases as the one we have here.

II. It is said that the trial court erred in not instructing the jury in the first instance as to the meaning of the contract as a matter of law, and then leaving it to the jury to say, under all the circumstances, whether or not, in view of all the testimony, that was the intention of the parties. The general rule, of course, is that the construction of a contract is a matter of law for the court, and not of fact for a

2. CONTRACTS:
construction:
province of
court and jury.

jury. But, like all rules, it has its exceptions and, in view of the issues tendered here, we think there was no error.

The questions naturally arise: What should the court have said regarding the contract? Should it have told the jury that it meant that the well should be piped from top to bottom with standard iron pipe, in the face of testimony that such a well would not and could not have met the tests required by the contract itself? Or should it have said, as a matter of law, that the contract did not in terms require that the well should be completely piped; but that, if the parties during the negotiations agreed that it should be so piped, and used this phrase as expressive of their desires and purposes, then the jury should find that the well was not constructed in accord with the terms of the contract, and plaintiff should not recover? As a matter of fact, in view of the conflicting testimony, the trial court left it to the jury to say what the parties meant by the term a "complete piped well," in view of all the other provisions of the contract and the testimony adduced pro and con, and the jury found specially, in answer to a special interrogatory, that the plaintiff furnished and completed a well for defendant sufficient in capacity to furnish a continual flow of water for ten hours by the pump furnished by defendant.

We see no error in the instruction given on the construction of the contract of which defendant may justly complain. 2 Elliott on Contracts, Secs. 1564, 1565; *Brown v. M'Gran*, 10 L. Ed. (U. S.) 550 (14 Peters 479); *Ginnuth v. Blankenship* (Tex.), 28 S. W. 828; *Coquillard v. Hovey* (Nebr.), 37 N. W. 479. Moreover, the defendant asked instructions to the effect that the question of the construction of the contract was for the jury, and it is in no position to complain.

III. Many of the instructions given by the court are challenged largely because, standing alone, they were erroneous. Perhaps some were incomplete in themselves; but counsel must not forget the rule that all the instructions are to be taken

and construed together; and if, so construed, they are complete and not contradictory, and none of them are affirmatively erroneous to such an extent as that they could not be cured by subsequent ones without producing a conflict, they should stand. The trial court fairly summed up the entire matter in its 17th instruction, reading as follows:

"Plaintiff claims that he constructed and finished in workmanlike manner the well in question, and that it was six inches in diameter at the bottom; that it was cased with pipe in the manner and at all places necessary to permanently prevent all caving and to keep out all foreign and undesirable matters; that it had therein sufficient water to stand a continuous ten-hour test with a continual flow of water during the test, the pump that was furnished by defendant being operated to its substantial full capacity. If you should find from the evidence that these are facts, then you are told that plaintiff had constructed the well in accordance with the terms of the contract and is entitled to recover in this action, providing you find that under the terms of the contract that the well was not to be piped from the top of the well to its bottom."

This was in entire harmony with the other instructions, and there was no conflict. The burden of proving compliance with the terms of the contract in all its parts was properly placed upon the plaintiff by several of the instructions given; and the real issues of fact between the parties were sharply defined in the instructions, and the jury could not have been misled thereby. This same thought is an answer to the complaint made of the court in refusing instructions asked by the defendant. In so far as these were correct, they were given in substance, if not in terms, by the court in its charge. It is useless to set them out *in extenso*. We have already referred to them in substance, and the exact points made are met by the prior suggestions in this opinion.

IV. Misconduct of the jury and of the bailiff in charge

thereof was made part of the grounds of the motion for a new trial. The misconduct of the bailiff is an alleged statement made by him to the foreman of the jury to the effect that they, the jury, would be kept from Saturday night, the time when the inquiry was made of the bailiff, until Monday, unless they agreed upon a verdict. The bailiff admits that he laughingly made such a remark to some member or members of the jury; but it does not appear that he pretended to speak with authority from the court, and no such statement was made by the court or judge at any time, nor was it authorized by either. Some of the jurors say that this, in part at least, induced them to agree upon a verdict which they would not otherwise have rendered. The jurors who made affidavits do not agree who it was to whom the bailiff spoke. Others, and a majority, say that the remark, if made, was not made to the foreman, and they deny having heard that any such statement was made or repeated in the jury room. The trial court was justified in finding that the remark, if made, was nothing more than a jest, and that it had no influence upon the jury. In such cases, it is incumbent on the defeated party to show not only misconduct of the officer in charge, but also that prejudice resulted therefrom. *Purcell v. Tibbles*, 101 Iowa 24; *Brossard v. Chicago, M. & St. P. R. Co.*, 167 Iowa 703. The trial court was justified in denying the motion on this ground.

The alleged misconduct of the jury consists of certain statements said to have been made by the jurors in their discussion of the case in the jury room after retiring to deliberate upon their verdict, to the effect that the town rejected the well because it was not in a proper location and required the hauling of coal some distance, whereas it might have been located near the railway; that the town council had refused plaintiff's request on Saturday before the trial to make another test of the well; that some of the jurors

3. NEW TRIAL:
conduct of
bailiff: unau-
thorized state-
ments to jury.

4. NEW TRIAL:
conduct of
jury: unwar-
ranted discus-
sion.

were not satisfied with the verdict, but thought from the court's instructions that plaintiff was entitled to all that he sued for, or nothing, and, believing that he was entitled to something, they finally agreed to the verdict. Seven jurors joined in an affidavit to the effect that someone mentioned during the deliberations of the jury that the town was not satisfied with the location of the well, but that this was not stated in connection with the case or as a matter of personal knowledge of the juror, and was not considered as having any bearing upon the controversy; that no reference was made during the discussion of the test which plaintiff offered to make just before the trial; but that the reference was to a proposed test in January preceding the trial, when plaintiff appeared with his counsel before the town council. This last was a proper matter for consideration. From other affidavits, it appears that there never was any disagreement between the jurors as to the right of the plaintiff to recover, and that the sole matter of difference was over the amount of his recovery, a large majority of the jury at all times favoring a verdict for the full amount claimed. Most, if not all, of the matters insisted upon in the verdict and cannot be considered. *Clark v. Van Vleck*, 135 Iowa 194, 200. The trial court was justified in finding that there was no such misconduct on the part of any of the jurors as would be ground for a new trial. Its conclusion on conflicting testimony is binding upon us. *Montgomery v. Hanson*, 122 Iowa 222; *State v. Baughman*, 111 Iowa 71; *Baxter v. Cedar Rapids*, 103 Iowa 599; *State v. Steidley*, 135 Iowa 512; *Strand v. Grinnell Auto. Garage Co.*, 136 Iowa 68; *State v. McClure*, 159 Iowa 351; *Hoyt v. Hoyt*, 137 Iowa 563; *State v. Steen*, 125 Iowa 307; *Rosche v. Bettendorf Axle Co.*, 168 Iowa 461.

V. Another ground of the motion for a new trial was newly discovered testimony. All of the testi-

5. NEW TRIAL:
newly discov-
ered evidence:
diligence.

mony which it is claimed was newly discovered came, except in two instances, from persons who were used as witnesses upon the

trial, and no excuse is shown for not inquiring about the matters which it is now said they would testify to. As to the exceptional cases, one was a man who was present during the whole trial, and who was referred to by other witnesses as being present when a particular transaction occurred. No such showing of diligence is made as the law requires in ascertaining what his testimony would be. The other person who was not present shows that his testimony, if received, would be cumulative only. For these reasons, it is apparent that the motion was properly overruled on this ground.

Another piece of testimony claimed to have been newly discovered was a rough pencil sketch of a preliminary contract between the parties. It was claimed on the trial, and testimony

6. NEW TRIAL: newly discovered evidence: documentary evidence. was offered to the effect, that this sketch had been lost, and secondary evidence was introduced as to its contents. It is not claimed

that this sketch when it turned up contained anything other or different from what the witness said it did, and as appellant had the benefit of parol testimony as to the contents of the instrument because of its loss, its discovery after trial does not amount to newly discovered testimony, unless it is clearly shown that there is something in the original different from what was testified to, which would call for another kind of a verdict. The following authorities support our decision on this point: *Rockwell v. Ketchum*, 149 Iowa 507, 515; *Trimble v. Tantlinger*, 104 Iowa 665; *Marengo Savings Bank v. Kent*, 135 Iowa 386.

VI. A great number of errors are assigned on the admission and rejection of testimony. We have had great difficulty in ascertaining just what the record is on many of these mat-

7. CONTRACTS: performance: notice: oral or written. ters, because of the fact that, while the abstract is very full, appellees have filed an amended abstract of 71 pages, correcting the record in a very substantial manner and putting a new version on some of the rulings. This amended abstract is not denied, save in one particular by appellant;

and the labor of comparing the two abstracts and making the necessary corrections should not have been imposed upon us. If any mistakes were made, they should not be charged to us. We do not deem it important to refer to many of these rulings, as they relate in the main to matters already discussed. Complaint is made because plaintiff was permitted to testify that he gave verbal notice to the mayor of the town and to one of its council of the test which he proposed to make of the well under the terms of the contract. The contract does not provide the kind of notice, and a verbal one to the mayor would be sufficient.

Complaint is made of a ruling denying defendant the right upon cross-examination of plaintiff to show what the mayor, Hill, said to him, Becker, about the well's not going through the rock all the way after it was struck at approximately 412 feet from the surface. This was not cross-examination; and if it were, it was not at all important what the mayor said to plaintiff. The mayor was a witness for the defendant, and he was permitted to state all his knowledge on the subject, no matter how acquired.

The geological formations through which the well was driven were important, and plaintiff introduced the assistant state geologist as an expert; and having fully qualified to testify, this witness proceeded to state the formations and different strata through which the well passed. As a part of his examination, a blueprint of these strata was introduced in evidence. All this without objection, although defendant's counsel subsequently lodged objections against the blueprint. There was no error of which defendant may complain. The trial court struck out a statement said to have been made by one Peck, who operated the pump when the test was being made, relative to the stroke of the machine. This may have been error; but counsel for defendant stated that the ruling was satisfactory to them, although it is true

8. WITNESSES:
cross-examina-
tion: limita-
tion.

9. APPEAL AND
ERROR: parties
entitled to al-
lege error: re-
ceiving evi-
dence without
objection.

that they afterward said, "Give us the usual exception." The ruling might well have been the other way, as the statements made by a servant in the discharge of his master's duties are part of the *res gestae* and generally admissible. However, the matter was fully covered by other testimony, and the ruling seemed to be entirely satisfactory to counsel. We shall not say more. A careful examination of the record discloses no prejudicial error and the judgment must be and it is—*Affirmed*.

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

LILLIE P. GARRETSON, Appellant, v. WESTERN LIFE INDEMNITY Co., Appellee.

INSURANCE: Life Insurance—Reinsurance—Reciprocal Rights and

- 1 **Liability.** General rule of law recognized that a reinsurer is only liable on *his* contract of reinsurance; that the assured may *reject* the offered reinsurance and sue on his original contract; or that he (the assured) may *accept* the reinsurance, and that, by accepting and paying premiums to the reinsurer, he cannot recover of such reinsurer on the original policy, unless his contract or necessary implication permits him to do so.

INSURANCE: Life Insurance—Insurance and Reinsurance—State

- 2 **Laws Governing.** The laws of Indiana, under which a policy of insurance is issued, do not follow and become a part of a policy issued by an Illinois company, which reinsures a Pennsylvania policy, executed in lieu of the original Indiana policy; and especially so when the Pennsylvania policy was not a reinsurance of the original Indiana policy, but was a new and different policy.

INSURANCE: Life Insurance—Reinsurance—State Laws Governing.

- 3 The laws of the state governing an *original* contract of insurance do not necessarily follow and become a part of subsequent contracts of *reinsurance*.

PRINCIPLE APPLIED: An assured received a policy of life insurance issued under the laws of Indiana, which laws provide, in substance, that the liability of a reinsurer of such a policy shall be the same as though the reinsurer had issued the policy which is reinsured. The policy in question was reinsured by a company organized under the laws of Illinois. This latter company passed into receivership, and defendant, also an Illinois company, with

the approval of the Illinois insurance authorities and the court, contracted with the insolvent company to reinsure, and did reinsure, *in a limited way*, the obligations of the defunct Illinois company. *Held*, the laws of Indiana did not follow and become a part of defendant's contract of reinsurance.

INSURANCE: Life Insurance—Reinsurance—Liability—Evidence.

- 4 Evidence reviewed, and *held* insufficient to show defendant's liability on contracts of reinsurance in excess of the limited liability pleaded.

INSURANCE: Life Insurance—Reinsurance—Estoppel to Deny Liability—Evidence.

- 5 Evidence reviewed, and *held*, in an action on contracts of reinsurance, insufficient to estop defendant from insisting on the limited liability provided in the contract.

ACTIONS: Transfer on Calendar—Motion—Timeliness.

- 6 transfer from law to equity should be timely.

PRINCIPLE APPLIED: Plaintiff sought to recover at law on policies of insurance. At the close of the second trial, and after both parties had rested, and after three attempts had been made to so amend the petition as to state a cause of action at law for the same alleged fraud, and after defendant's motion to direct a verdict in his favor had been argued, plaintiff, without dismissing his action at law, filed a motion to transfer the action to equity for reformation of the contract because of mistake induced by fraud. *Held*, motion properly overruled.

Appeal from Polk District Court.—W. S. AYRES, Judge.

TUESDAY, APRIL 4, 1916.

ACTION at law upon contracts of reinsurance made by defendant company with the United States Life Endowment Company and the Life Insurance Company of Pennsylvania, whereby it is claimed defendant company reinsured one William C. Garretson on two original policies in the sum of \$4,000 each, issued by the Old Wayne Mutual Life Association, of Indiana, to the said Garretson, in which plaintiff herein was made the beneficiary. The death of the insured and the making of proper proofs of death were alleged and are practically admitted; but defendant claimed a limited liability to the assured or his beneficiary under the terms of its reinsurance contracts, and also pleaded that one of the policies

was forfeited for non-payment of dues. A jury was called and, at the conclusion of the testimony, the trial court directed a verdict for plaintiff in the sum of \$308.37 on the two policies. Before the direction was given to the jury, plaintiff moved to transfer the case to equity, and tendered a substituted petition in equity, asking, in effect, for the construction of the various reinsurance contracts appearing in the record, and for a reformation thereof to comply with the understanding of the parties. This motion was overruled. Thereafter, plaintiff filed a motion for a new trial, based on various grounds, and also for judgment against defendant for the full amount of the two policies. This motion was overruled, and judgment was entered upon the directed verdict, and plaintiff appeals.

I. H. Tomlinson and Jas. A. Merritt, for appellant.

Coffin & Hippee and Thomas J. Graydon, for appellee.

Per Curiam.—I. The record is long, and the facts complicated by reason of the number of reinsurance contracts intervening between the issuance of the original policies to the insured and the final contracts entered into by the defendant with its immediate reinsurers; and we shall have some difficulty in making a clear and accurate statement of even the undisputed facts.

Garretson took out his original policies in the year 1893, in what was known as the Old Wayne Mutual Life Association, of Indianapolis, Indiana. They were each for a sum of not to exceed \$4,000, and the premium was \$25.00 in cash upon the issuance of the policies, and assessments were at the rate of \$4.00 each, limited to not exceeding one for any one month. The policies differ somewhat in their phraseology and in the amount and number of assessments to be paid; but they are each what is known in the law as assessment policies.

As we understand it, the Old Wayne Company became financially involved and, in the year 1904, it reinsured all its business in the Indiana Mutual Life Insurance Company.

This latter company in turn, in the year 1907, reinsured in the Marquette Insurance Company, and the latter company, in the same year, reinsured with the Federal Mutual Endowment Company. The Federal Mutual Company reinsured in the United States Life Endowment Company, and the latter company, in the year 1910, reinsured in the defendant company. This, as we understand it, is the history of one of the policies upon which this action is based. The other policy issued by the Old Wayne Company was, in the year 1904, reinsured by the Western Life Insurance Company of Chicago, Illinois; and in the same year, the Western Company reinsured in the Life Insurance Company of Pennsylvania. In the year 1905, the Knights Templar and Masons Life Indemnity Company, of Chicago, which is the defendant in this case, at that time doing business under the name just stated, took over the entire membership of the Pennsylvania Company under a written contract between the two companies, whereby it is claimed that defendant undertook to carry out all the terms of the original policy issued by the Old Wayne Company under the same terms and conditions. Riders to be attached to the policies were issued from time to time and sent to Garretson by the several reinsuring companies, and some controversy arises at this point as to his acceptance of some of them. For the purpose of the case, it is admitted that Garretson paid to the proper companies the assessments and premiums called for by the original policies, down until the time of his death. Defendant insists that it is bound only by the terms of its reinsurance contracts, and that it never at any time agreed to perform the original contracts unconditionally. As to the first policy, it pleaded that, while the United States Life Endowment Company was responsible under its contract of reinsurance, it became insolvent, and, with the approval of the state insurance superintendent of the state of Illinois, and a circuit court of that state, the affairs of the United States Company being then in the hands of a receiver, defendant company entered into a contract whereby it undertook

to reinsure the policy holders of the United States Company, upon certain terms and conditions which limited its liability to the amount found due by the district court in this case. As to the second policy, the defendant claims that it simply undertook to perform an agreement made by the Pennsylvania Company under its No. 47821, whereby it (the Pennsylvania Company) issued to Garretson its policy to replace the one issued by the Old Wayne Company, its number being 7442, and that, by the terms of the Pennsylvania policy, that company agreed, upon the death of Garretson, to pay to his beneficiary:

“Such sum (not to exceed the principal amount named in said policy hereby replaced) as the said advance premium hereinabove provided will purchase for the present attained age of the insured, computed upon the company’s Schedule of Premium Rates, printed on the back hereof, and which is hereby made a part of this contract.”

This policy also provides:

“That the provisions and conditions written or printed by the Company on the following page or pages of this contract, are a part of this contract as fully as if they were recited at length over the signature hereto affixed.”

The defendant company, under the name of the Knights Templar Company, agreed in its contract with the Pennsylvania Company as follows:

“This certifies that the amount which may be payable at the death of the insured under and by virtue of a certain Policy No. 47821 upon the life of W. C. Garretson, issued or assumed by the Life Insurance Company of Pennsylvania, will be assumed by the Knights Templar and Masons Life Indemnity Company.”

This is the only contract it made with the Pennsylvania Company. According to the record, if there were nothing

more than these two contracts of the Pennsylvania Company and the defendant, under the name of the Knights Templar Company, the trial court was right in fixing defendant's liability under these contracts at \$128.90.

The general rule as to reinsurance contracts is that the reinsurer is to be held liable either under its reinsurance contract or upon a subsequent agreement made between it and the

assured, and the assured has the right to accept the reinsurance offered him, or to sue the original company for damages. If he accepts the reinsurance contract, and pays premiums to the reinsurance company, he is

1. **INSURANCE:**
life insurance:
reinsurance:
reciprocal
rights and lia-
bility.

bound by the terms of the reinsurance contract, and cannot recover of the reinsuring company on the old policy unless the reinsurance contract, in terms, or by necessary implication, contains an agreement to assume, or be responsible on, the policy reinsured. *Spande v. Western Life Indemnity Co.* (Ore.), 117 Pac. 973 (122 Pac. 38, 39); *Epworth League v. Olney* (Mich.), 98 N. W. 860; *Northwestern National Life v. Gray*, 161 Fed. 488, and cases cited; *Glen v. Hope Mutual Ins. Co.*, 56 N. Y. 379; *Fischer v. Hope Mutual Ins. Co.*, 69 N. Y. 161; *Lovell v. St. Louis Mutual Life Ins. Co.*, 111 U. S. 264 (4 Sup. Ct. Rep. 390; 28 L. Ed. 423.)

Conscious of this general rule, appellant seeks to avoid it on several grounds. In the first place, it is claimed that, as the original policies were Indiana contracts, they and all subsequent contracts of reinsurance are governed

2. **INSURANCE:**
life insurance:
insurance and
reinsurance:
state laws gov-
erning.

by the laws of that state; and that as, by a statute of that state, it is provided that every reinsurance contract shall be as binding upon the company making the same, and its liability to the person injured shall be the same, as if the original policies had been issued by such company, defendant is bound to the same extent as if it had issued the Old Wayne policies.

The difficulty with this contention as to the second of the policies is that, as we have already pointed out, the defendant

never did either directly or indirectly reinsure the Old Wayne policy. In lieu of that policy, Garretson, the insured, accepted a new policy from the Pennsylvania Company, was reinstated as a policy holder in such company after having defaulted in the payment of his premiums and continued to pay his premiums either to the Pennsylvania Company or the defendant, down until the time of his death. The defendant did not reinsure any other policy than the one issued by the Pennsylvania Company to the assured; and, under the proofs, there can be no recovery except under this contract of reinsurance, which did not purport to assume any other liability than that of the Pennsylvania Company on the policy described in the contract of reinsurance.

As to the first policy, the defendant became liable, if at all, by reason of the reinsurance contract with the United States Endowment Company, both of which were Illinois companies,

approved by the state insurance commissioner and the circuit court having under its control the receiver of the latter company; and the validity of that contract which plaintiff must rely upon in order to entitle her to

recover must be determined by the law of the state where her contract was made. There were at least two intervening reinsurance contracts, one of which was by an Indiana company; but plaintiff is not relying upon any of these as a ground for recovery against the defendant, save as we shall hereinafter state.

It is quite apparent that the validity of the contract between the United States Company and this defendant, which the assured or his beneficiary has accepted, must be determined either by the law of the state where it was made, or by the law of this state, where it was accepted by the assured, or the plaintiff, as beneficiary under the policy. *In re Breitung's Estate* (Wis.), 46 N. W. 891; *Born v. Home Ins. Co.*, 120 Iowa 299; *Hartford Ins. Co. v. Lasher* (Vt.), 29 Atl. 629; *North Hampton Co. v. Tuttle*, 40 N. J. L. 476.

8. INSURANCE:
life insurance:
reinsurance:
state laws gov-
erning.

Defendant, then, must be held liable on its own contracts, and not upon the contract of other companies, save as those contracts were recognized and assumed by it, and not upon the statute of the state of Indiana with refer-

4. **INSURANCE:**
life insurance:
reinsurance:
liability: evi-
dence.

ence to the validity of reinsurance contracts made in that state. Defendant did not contract with an Indiana company, and its contracts, whatever they are, were entered into in Illinois, Pennsylvania or Iowa, in none of which states is there any statute regarding the validity of reinsurance contracts. By the terms of those contracts, which are made up of a so-called rider and the reinsurance agreement itself, the defendant obligated itself as follows:

"THIS CERTIFIES, That all the covenants and obligations heretofore imposed and undertaken by the UNITED STATES LIFE ENDOWMENT COMPANY, under and by virtue of a certain policy rider No. 23603, issued or assumed by said UNITED STATES LIFE ENDOWMENT COMPANY, on the life of William C. Garretson, are hereby assumed by the WESTERN LIFE INDEMNITY COMPANY to the extent and in the manner as set forth in a certain contract of reinsurance made and entered into by and between the UNITED STATES LIFE ENDOWMENT COMPANY of Chicago, Illinois, and the WESTERN LIFE INDEMNITY COMPANY of Chicago, Illinois, on the 4th day of June, A. D. 1910, which said contract has been approved by the insurance superintendent of the state of Illinois, as provided by law.

"Executed and delivered at the HOME OFFICE of the WESTERN LIFE INDEMNITY COMPANY, in Chicago, Illinois, this 26th day of August, 1910."

This was the form of the so-called rider. The reinsurance contract itself provides that:

"The said WESTERN COMPANY, in consideration of the mutual acceptance and performance by the parties hereto of the covenants and agreements hereinafter recited, do hereby reinsure and accept as its members, upon the terms and to the

extent as hereinafter provided, all the living benefit members of the said United States Company . . . ; and whose membership in said United States Company is in good standing on the date this agreement becomes effective by the approval of the insurance superintendent of the state of Illinois, and who shall accept and assent to this contract in the manner hereinafter provided As to each and every such member of said Western Company will and does hereby assume liability from and after twelve o'clock noon of the day this agreement goes into effect under his or her policy in said United States Company, in accordance with the following conditions, namely:

"Said members individually shall at their option continue paying to said Western Company the same premium amounts for the same period of insurance and at the same times as heretofore paid to said United States Company, and be thereafter insured against death in said Western Company for such an amount of insurance or indemnity, not exceeding the sum provided to be paid by the terms of the policy in the United States Company held by said members respectively, and such an amount only, as the premiums paid by each of said members to said Western Company will purchase, computed according to the tables of rates attached to this contract marked Exhibit 'A,' and applicable to the attained age respectively of the member so paying at nearest birthday on the day this agreement goes into effect, which insurance or indemnity shall be payable in the way and manner provided by the **WHOLE LIFE POLICY** of the said Western Company, to which, in the present practice and course of business of the said Western Company, the said table of rates applies; and at any time hereafter upon making written application therefor, any of said members shall receive, provided the said member's policy reinsured hereunder is then in force, and upon surrender of such existing policy, free of expense and without further medical examination, the **WHOLE LIFE POLICY** of the said Western Company, to which said table of rates applies written for the amount of insurance so purchased, which net

amount of insurance or indemnity shall be plainly expressed in words and figures in the face of the policy and be subject to no lien or deduction other than for the payment of the regular premiums as the same may become due by the terms of the new policy. . . . This agreement is made by and between said Western Company and the said United States Company in behalf of all the benefit members of the said United States Company reinsured hereunder, and one payment to said Western Company for the maintenance of his or her policy under the provisions of this agreement by any present policy holders in said United States Company shall be regarded as conclusive evidence of said member's individual acceptance of and assent to this agreement, except those members who avail themselves of the rights and privileges provided for in paragraph 245 of Chapter 73 of Hurd's Revised Statutes of Illinois, special reference being made to the Edition of 1908."

The table attached to this contract as Exhibit "A" reads as follows:

"PREMIUMS FOR \$1,000 OF WHOLE LIFE INSURANCE PAYABLE.

| Age | Annual | Semi-Annual | Quarterly | Monthly | Age |
|-----|----------|-------------|-----------|---------|-----|
| 65 | \$ 78.85 | \$41.00 | \$20.90 | \$ 7.10 | 65 |
| 66 | 83.24 | 43.28 | 22.06 | 7.49 | 66 |
| 67 | 87.91 | 45.71 | 23.30 | 7.91 | 67 |
| 68 | 92.89 | 48.30 | 24.62 | 8.36 | 68 |
| 69 | 98.20 | 51.06 | 26.02 | 8.84 | 69 |
| 70 | 104.54 | 54.36 | 27.70 | 9.41 | 70 |
| 71 | 111.13 | 57.79 | 29.45 | 10.00 | 71 |
| 72 | 118.21 | 61.47 | 31.33 | 10.64 | 72 |
| 73 | 125.85 | 65.44 | 33.25 | 11.33 | 73 |
| 74 | 134.14 | 69.75 | 35.55 | 12.07 | 74 |
| 75 | 143.19 | 74.46 | 37.95 | 12.89 | 75 |
| 76 | 153.14 | 79.63 | 40.58 | 13.78 | 76 |
| 77 | 164.12 | 85.34 | 43.48 | 14.77 | 77 |
| 78 | 176.30 | 91.68 | 46.72 | 15.87 | 78 |
| 79 | 189.87 | 98.73 | 50.32 | 17.09 | 79" |

The only showing as to the contract of the United States Company appears in the following certificate:

"No. 23603

Premium 8.00

"Incorporated under the laws of the State of Illinois.

"UNITED STATES LIFE ENDOWMENT COMPANY, OF
CHICAGO, ILLINOIS.

"THIS CERTIFICATE is issued to William C. Garretson to be attached to CERTIFICATE or POLICY NO. 15446 of the Federal Mutual Endowment Life Insurance Company, of Chicago, Illinois, subject to all the provisions of the contract of reinsurance between the FEDERAL MUTUAL ENDOWMENT LIFE INSURANCE COMPANY, AND THE UNITED STATES LIFE ENDOWMENT COMPANY dated November 24th, 1908, which it is hereby agreed constitutes a policy of insurance in and that the holder of this certificate becomes a member of the said UNITED STATES LIFE ENDOWMENT COMPANY, and the said UNITED STATES LIFE ENDOWMENT COMPANY DOES HEREBY ASSUME the foregoing certificate or policy of the said FEDERAL MUTUAL ENDOWMENT LIFE INSURANCE COMPANY, in accordance with the terms and conditions of the said reinsurance contract, and the holder of this certificate hereby agrees to all of the terms and conditions of the said reinsurance contract. The said UNITED STATES LIFE ENDOWMENT COMPANY agrees to carry said certificate or policy hereby assumed, provided all premiums required to maintain in force such policy or certificate shall be paid to the UNITED STATES LIFE ENDOWMENT COMPANY, as provided in the said original policy or certificate, and by the said reinsurance contract.

"No change of policy or certificate other than the attachment of this RIDER or REINSURANCE POLICY to the original certificate shall be necessary in order to bind the UNITED STATES LIFE ENDOWMENT COMPANY to the payment of the policy of which it shall become a part, or to bind the insured hereunder to the contract with the UNITED STATES LIFE ENDOWMENT COM-

PANY the same as if the original policy had been issued by the reinsuring COMPANY.

"IN WITNESS WHEREOF, the said UNITED STATES LIFE ENDOWMENT COMPANY has caused these presents to be signed by its PRESIDENT and SECRETARY, at the CITY OF CHICAGO, ILLINOIS, this 24th day of November, A. D. 1908."

The terms of the reinsurance contract therein referred to are not found in the record. The only showing as to the Federal Mutual contract is as follows:

"FEDERAL MUTUAL ENDOWMENT LIFE INS. CO.,
OF CHICAGO, Illinois. 2210.

"2214 APPLICATION FOR REINSURANCE. 15446.

"WHEREAS, Policy No. 7442 issued to me by the Indiana Mutual Life Insurance Company, of Indiana; is null and void, and desiring insurance with and to have said policy reinstated in the FEDERAL MUTUAL LIFE INSURANCE COMPANY, of Chicago, Ill., in accordance with and subject to all the provisions and conditions of the contract of reinsurance between said company and myself, now, therefore, as a consideration and basis for reinsurance and transfer in and to said FEDERAL MUTUAL ENDOWMENT LIFE INSURANCE COMPANY, I, Wm. C. Garretson, of Des Moines, state of Iowa, do herewith enclose \$8.00 to be applied on my premium payment, and I do hereby warrant and declare that I am now in sound health and free from disease; that there is now existing no condition of person or occupation tending to impair my health, injure my constitution or shorten my life, and that I have not been sick or required the services of a physician since making my application for insurance on my life to said Indiana Mutual Life Insurance Company, except as follows:

"Name of disease, Old age only; severity, usual health; and I do also warrant that the answers written to the questions

in the original application, upon which said policy was issued by said company, were full, complete, correct and true, and are equally true today in every respect, except as to the natural increase in my age, and I hereby agree that these statements shall be equally as binding as those contained in my original application, it being understood that this reinsurance shall not take effect until the above mentioned premium payment is actually made to and received and accepted by the **FEDERAL MUTUAL ENDOWMENT LIFE INSURANCE COMPANY**; and it is further understood that, should it appear or be proven that this warranty is false and untrue, or should any premium on said policy hereafter remain unpaid beyond the date upon which it falls due, then said policy shall be null and void, and all payments thereon forfeited to the Company.

"Dated at Des Moines, this 27th day of August, 1907.
WILLIAM C. GARRETSON, Insured.

"I, beneficiary under the above mentioned policy, do hereby agree that any and all rights I may, can or shall have by reason of the reinstatement of said policy upon the foregoing application, shall in all respects be subject to, and governed by, the terms, conditions, restrictions and warranties as in said application set forth. **LILLIE P. GARRETSON**, Beneficiary.

"August 27th, 1907.

"Approved this 27th day of August, Aug. 30, 1907. **R. S. Kirkpatrick**, Medical Director.

"**Joseph M. Blake**, M. D.

"Note: To insure acceptance, all blank spaces must be filled."

"**TO THE MEMBERS OF THE FEDERAL MUTUAL ENDOWMENT LIFE INSURANCE COMPANY.**

"**GREETING:—**

"Pursuant to formal notice, at a meeting of your members, held at the general offices of your company, November 24, 1908, a consolidation and reinsurance agreement was

approved without a dissenting voice. This consolidation makes our company the largest mutual endowment life company in the United States. We welcome you as one of our members and believe our relationship will prove mutually profitable and agreeable. There will be no change in the amount of the policy held by you and assumed by this company or of the amount of premiums you are to pay. Your policy was assumed by this company at 2 o'clock P. M., November 24, 1908. Attach the enclosed rider thereto and hereafter remit your premiums direct to this office, payable to the order of the United States Life Endowment Company. We also enclose a copy of the reinsurance contract and a statement of the last audit of the Company.

"Fraternally and sincerely yours,

"UNITED STATES LIFE ENDOWMENT COMPANY.

"R. E. Mabry, Sec'y.

"P. S. The above statement is correct and the transfer has met with unanimous endorsement of the officers and directors of the Federal Company, as well as that of its policy holders. All are pleased that the transfer of risks has been made to a company that is able to show its liability to care for all its members to such marked advantage.

"Very truly yours,

"FEDERAL MUTUAL ENDOWMENT LIFE INSURANCE COMPANY.

"George O. Nesbit, Sec'y."

The reinsurance contract of the Marquette Mutual Company undertook to limit its liability, and gave to the assured an option to take a new policy on new rates, or to continue paying under his old policy with a limited liability on the part of the Marquette Company. We do not set out this agreement in full, as it would serve no useful purpose.

As to the second policy, it is claimed by defendant that the assured exercised an option given him by the Life Insurance Company of Pennsylvania, and accepted a policy in this

latter company bearing its number 47821, which reads as follows:

“Number 47821.

“The LIFE INSURANCE COMPANY

OF

PENNSYLVANIA

“THIS CONTRACT OF INSURANCE is made by the Life Insurance Company of Pennsylvania, to replace Policy Number 7442 for four thousand dollars, issued by the Old Wayne Mutual Life Association of Indianapolis, Indiana.

“In consideration of the payment of four dollars on or before 5 o'clock P. M. of the first day of each month after the date hereof in every year during the continuance of this contract, the company agrees to pay to Lillie P. Garretson, if living, otherwise to the insured's executors, administrators or assigns, or such other beneficiaries as may be designated by the insured, and hereinafter provided, at the home office of the company, in the city of Philadelphia, state of Pennsylvania, within ninety days after receipt and approval of proofs satisfactory to the company of the fact and the cause of death of W. C. Garretson, of Knoxville, in county of in the state of Iowa, herein called the insured, and a valid claim hereunder, such sum (not to exceed the principal amount named in said policy hereby replaced) as the said advance premium hereinabove provided will purchase for the present attained age of the insured, computed upon the company's schedule of premium rates, printed on the back hereof, and which is hereby made a part of this contract. The privileges and conditions written or printed by the company, on the following page or pages of this contract, are a part of this contract as fully as if they were recited at length over the signature hereto affixed.

“In witness whereof, the Life Insurance Company of Pennsylvania has, this 1st day of October, 1904, by its duly authorized officers, executed this contract at its home office in the city of Philadelphia, state of Pennsylvania; but the same shall not be binding until it is delivered to said insured during

his lifetime, and good health, nor until the first payment herein required has been received and accepted by the company.

"S. B. Blessoe, Assistant Secretary.

"F. S. Campbell, President.

"PRIVILEGES AND CONDITIONS.

"The premiums on this contract for the first year are for preliminary term insurance and are applicable in full to the payment of mortuary or expense obligations of the company. Beginning with the second year of this contract in force 70 per centum of the premium shall constitute the net mortuary premium of the company hereon, and this contract shall be treated and construed as a whole life contract issued as of the then age of the insured and the reserve according to the Actuaries' Table of Mortality, and four per centum interest may be maintained by the company upon this contract, for which purpose the mortuary element of the premium hereon may be varied according to the mortality experience of the company. The company is not required by law to maintain the reserve which is required of other life insurance companies. The privileges of dividends provided for by this contract shall be available only when the reserve funds of the company are in excess of the amount required by law, and not less than \$100,000. . . . Seventh. The insured hereunder may continue to pay as premium on this contract the amount specified in the face hereof, or, within thirty days from date hereof, the insured may elect to pay an additional premium hereon sufficient (according to the company's premium rates printed elsewhere in this contract) to make the amount of insurance effective hereunder equal to the amount expressed in the original policy, hereby replaced. After thirty days from the date hereof, the insured may make such election, provided he shall first furnish the company satisfactory evidence of good health and pay to the company an amount equal to the unpaid balance of such required premium from the date hereof, with interest at the rate of five

per centum per annum. . . . The policy described as replaced on the face of this contract is hereby cancelled, and no liability thereunder on the part of this company shall exist.

Schedule of Annual and Monthly Installment Premiums Referred To In This Contract for Each \$100.00 Insurance. Payable According To the Present Attained Age of the Insured.

| Age. | Annual Premiums | Monthly Installment Premiums |
|------|-----------------|------------------------------|
| 65 | \$11.21 | \$1.02 |
| 66 | 11.83 | 1.08 |
| 67 | 12.49 | 1.14 |
| 68 | 13.19 | 1.20 |
| 69 | 13.94 | 1.27 |
| 70 | 14.73 | 1.34 |
| 71 | 15.64 | 1.43 |
| 72 | 16.74 | 1.53 |
| 73 | 18.03 | 1.64 |
| 74 | 19.32 | 1.76 |
| 75 | 20.67 | 1.88 |

"Note: All persons under age 21 will be required to pay the rate of that age."

This is the policy or the contract which the defendant claims it assumed by its contract with the Pennsylvania Company, and defendant admits the issuance of this certificate or rider to the assured:

"KNIGHTS TEMPLARS AND MASONS LIFE INDEMNITY COMPANY,
Chicago, Illinois.

"This certifies that the amount which may be payable at the death of the insured, under and by virtue of a certain Policy No. 47821, upon the life of W. C. Garretson, issued or assumed by the Life Insurance Company of Pennsylvania,

will be assumed by the Knights Templars and Masons Life Indemnity Company, when a premium payment shall have been made on said policy to said Knight Templars and Mason Life Indemnity Company, and said premium shall have been duly acknowledged by a receipt signed by the General Manager of said Knights Templars and Masons Life Indemnity Company.

"Executed at the home office of the company at Chicago, Illinois, this 7th day of March, 1905. E. I. Rosenfeld, General Manager."

The assured failed to pay one of the premiums, or assessments, in time, and he made an application to the defendant for a renewal of his policy, from which we extract the following:

"Policy No. 47821. Payment herein, \$4.00. Approved
7-13-'05.

REVIVAL APPLICATION.

"I am the insured under Policy No. 47821 in the Western Life Indemnity Company, and I concede that, owing to default of payment on my part, said policy is now forfeited and of no force or effect, and I hereby apply to said company for the revival of said policy at the present rates, and in event that this application is granted by said company, and as a consideration therefor, I agree to make all payments upon said policy in conformity with its terms, and I agree that said policy shall be subject to the full operation of all its provisions and conditions, the same as though it were a new policy issued at the date upon which revival under this application may be granted, without medical examination. I expressly agree that the original application for said policy shall be effective and binding under the contract of insurance between myself and said company, the same as if made to said company at this date."

Plaintiff admits the making and issuance of these various documents, but denies the acceptance thereof, and bases her

claims upon the original contracts made by the Life Insurance Company of Pennsylvania with its immediate reinsurer, the Western Union Life Insurance Company, a rider issued by this latter company, and also a rider issued by the defendant company, which it is claimed was attached to the original Wayne policy. She admits the receipt of the papers last above quoted, by her husband before his death, but claims they were not attached to his policy; that he did not know the terms thereof and did not assent thereto; and that this suit is not founded thereon. This raises a square fact issue.

By the original agreement between the Life Insurance Company of Pennsylvania and the Western Union Life Company, of Illinois, the Life Insurance Company of Pennsylvania assumed the same liability to the policy holders of the Western Union Company as the latter company owed to its policy holders; but this latter company did not agree absolutely to pay the amount called for in the policy issued by the Old Wayne Company to the assured, Garretson. We shall not set out the contract between the Old Wayne Co. and the Western Union Life Co., as it would only encumber the record. The Life Insurance Company of Pennsylvania did not issue any policy or rider in which it undertook to pay the Old Wayne policy, but did issue the following:

“Attach this agreement to your WESTERN UNION LIFE INSURANCE COMPANY POLICY.

“LIFE INSURANCE COMPANY OF PENNSYLVANIA,

PHILADELPHIA, PA.

“THIS CERTIFIES, That W. C. GARRETSON, holder of POLICY NO. 7442 in the WESTERN UNION LIFE INSURANCE COMPANY, has accepted the terms of the agreement endorsed hereon, by the payment of the first premium of \$4.00, receipt whereof is hereby acknowledged, and the said WESTERN UNION LIFE INSURANCE COMPANY policy is hereby assumed by the life insurance company of PENNSYLVANIA, subject to its terms and the terms of said agreement.

"EXECUTED AT THE HOME OFFICE OF THE COMPANY, at PHILADELPHIA, PA., this 16th day of September, 1904. Lester B. Bales, Sec'y.

"Endorsed on the back of Exhibit 'I' are the following words in fine print: The contracts of the members who formerly belonged to the Old Wayne Life Insurance Company, are to be continued in force in the party of the first part, subject to the same terms and conditions as those upon which said members were transferred to the party of the second part."

The rider sent by the Knights Templar Co. to be attached has already been quoted over date of March 7th, 1905, and we find no other in the record.

It seems quite clear to us from the entire testimony that Garretson did agree with several of the companies to cancel his second Old Wayne policy, and that he accepted new policies in both the Western Union Co. and the Life Insurance Company of Pennsylvania, and that the only agreement the defendant ever made was with the Life Insurance Company of Pennsylvania to reinsure its policy holders, among whom was W. C. Garretson, the assured in this case. This is corroborated in several ways, and especially by allegations made in the original and first substituted petitions in this case, and by allegations made in a petition filed by plaintiff in the courts of Illinois. Again, after default in the payment of premiums, the defendant, in consideration of the release of its liability, expressly agreed to a revival of the policy, its No. 47821, and nothing more. This, of course, relieved it of any responsibility under the Old Wayne Company, save as the defendant undertook to assume it, and this it never did. Having thus laboriously traced the history of the several policies and contracts, we fail to find any agreement on the part of this defendant to carry out the original policies issued to Garretson by the Old Wayne Company, according to their terms. Indeed, as to the policy refer-

red to in the second count, there never was any agreement by the defendant to carry out the terms of that policy at all. It will be observed that the transaction with the United States Life Endowment Company was not strictly a contract of reinsurance, but really a purchase by the defendant from a receiver of the first mentioned company of its assets, which purchase contract was approved by the court appointing the receiver and by the insurance commissioner of the state of Illinois, and was the only obligation which the defendant assumed.

Realizing the force of these suggestions, plaintiff alleged in its petition that the defendant, as well as the other reinsuring companies, from time to time represented and stated to the assured and to plaintiff, as beneficiary, that the original policies would be carried out by the several reinsuring companies according to their terms, without diminution or increase of premiums, thereby inducing them to pay the premiums and to believe they had assurance to the full amount of the original policies; that the several companies treated the policies as in full force and had the benefits thereof; and that they are now estopped from denying liability thereon. There is no claim of any conspiracy among the several reinsuring companies, so that no one is to be charged with representations made by another; and the only question on this appeal is whether or not this defendant company has placed itself in such a position as to estop itself from relying on its contracts. There is no doubt that some of these reinsuring companies did considerable juggling, and some of them made rash, if not intentionally false, statements as to their liability under the terms of their respective contracts. But defendant is to be charged only by what it, or its officers, did in the premises. We have already set out what we regard as the material and relevant contracts, riders, etc., and need add only that the defendant sent out statements to the insured after it had made its reinsurance contracts, as follows:

5. INSURANCE:
life insurance:
reinsurance:
estoppel to
deny liability:
evidence.

"Chicago, February 18, 1905.

"Dear Sir:—

"Kindly attach the inclosed rider to your policy. By this agreement, this company assumes liability upon your policy upon receipt from you of your premium which will be due as shown by the inclosed premium notice. Until that date, the liability continues with the Life Insurance Company of Pennsylvania. I also inclose a copy of the last annual statement of this company, under date of December 31, 1904, and detailed statement of the assets. Please send your premium, on or before the date when due, within the inclosed envelope, and oblige.

"Very truly yours,

"E. I. ROSENFELD, General Manager."

At another time and after reinsuring the Life Insurance Company of Pennsylvania policies, it stated:

"This company has never indulged in any such practice, and the statement that this company has absorbed a great number of smaller companies and reduced the value of the policies in so doing, is without foundation in fact. This company has never 'absorbed' but one company, and that was the Life Insurance Company of Pennsylvania, a part of whose risks it took over in February of this year. It seems that the Life Insurance Company of Pennsylvania had, in past years, taken over a number of smaller companies, but with the past history of that company, this company has no concern, except so far as it specifically assumed certain risks of the Pennsylvania Company as they existed in February last, when the transfer occurred. The Western Life Indemnity Company has paid the full amount due to every previous policy holder of the Pennsylvania Company according to the terms and conditions of his policy, which terms and conditions were the full measure of the obligation assumed by the Western Life Indemnity Company when it assumed such risks."

And again it stated:

"We recognize the great financial loss which a man's family and business sustain in his death, and know the strong desire to provide against any possible want of his family, or the sacrifice of his business by his premature death. Many need protection for a few years only, during the time their families and business are wholly dependent upon them, or to bridge them over some new and unfinished enterprise. It is beyond their reach or not their wish to secure protection in 'Old Line,' 'Level Premium,' 'Legal Reserve' insurance companies while they could easily pay present actual cost for it, and protection at present actual cost is exactly what the Knights Templars and Masons Life Indemnity Company of Chicago can and does furnish.

"THIS COMPANY GUARANTEES, UNDER the laws of the state of Illinois,

"FIRST, to pay at death the full face of the policy.

"PAUSE—READ—THINK.

"The only valuable thing a man possesses that his dependent ones cannot inherit is his knowledge and experience which enable him to produce an income. This valuable possession is in danger of being lost to the family by death at any time."

And again it stated:

"To the Policy Holders of the
WESTERN LIFE INDEMNITY COMPANY.

MASONIC TEMPLE, CHICAGO.

"PAR. VII. REINSURANCE OF LIFE INSURANCE COMPANY OF PENNSYLVANIA MEMBERS.

"In February of this year, your company was enabled to acquire from and through your present manager for \$200,000, in one transaction, 5,600 members of the Life Insurance Company of Pennsylvania. The net income received from these members in less than eight months has already amounted

to more than \$87,000, being a return of nearly 44 per cent. of the total cost, and at this rate, within about twelve months more, the entire balance of the cost will have been repaid to your company, so that thenceforth the net income from the new members will be purely profits. You may not be aware of it, but the fact is, that competition in the business of procuring life insurance has become so unusually keen, by reason of the large number of insurance companies of different kinds, and the custom of paying agents large commissions for procuring business, that the actual expense of procuring new insurance is usually regarded as amounting to from one hundred to one hundred and fifty per cent. of the first year's premium on the new business. We have no hesitancy in expressing our belief that you will fully endorse the wisdom of that transaction."

These statements were all prior to the time that defendant made its agreement with the United States Life Endowment Company, and, of course, had no reference to the first policy sued on. The defendant's contract with that company was not made until August 26th, 1910; and of course these statements had no reference to that contract and cannot be said to have been the inducement thereof; nor can it be argued that plaintiff had a right to rely thereon, for they were made with reference entirely to the taking over of, or the reinsuring of, the policies of the Life Insurance Company of Pennsylvania. The contract with the United States Life Endowment Company was not made until something like five years thereafter. As to the second policy of the Old Wayne Company, we find that defendant never, at any time, assumed or agreed to become responsible for it. That policy was cancelled by agreement of the parties, and defendant's agreement was to pay policy No. 47821, issued by that company; and that company never agreed to pay the original Old Wayne policy, but undertook to reinsure a policy issued by the Western Union Company of Chicago. Going back now to the representations made by defendant's officers, we find that there was no misstatement

as to what this defendant had done with the policy holders in the Life Insurance Company of Pennsylvania. Again, it never made any statement anywhere as to any liability on the Old Wayne policy which it had taken over from the Life Insurance Company of Pennsylvania. Moreover, Garretson was no longer relying on his Old Wayne policy, for he had elected to hold the Western Union under the terms of its agreement until he accepted the policy of the Life Insurance Company of Pennsylvania; and thereafter he agreed, after a default in his premiums to the defendant, to accept the Life Insurance Company of Pennsylvania policy as the policy of the defendant company. Whilst the assured, Garretson, may have believed that the second of his policies had at one time been reinsured by the Life Insurance Company of Pennsylvania, he accepted a policy in that company in lieu thereof, and this policy expressly limited the liability of that company, as already stated. The defendant assumed liability under that policy, and not on the one issued by the Old Wayne Company, and no misrepresentations were made by the defendant about it. Moreover, the necessary elements to create an estoppel were not proved, and the false and fraudulent representations pleaded cannot, of themselves, be relied upon as an estoppel. They might, if proved, be sufficient ground for an action at law for damages, or be ground for rescinding the contracts and recovering back the money paid thereon, but in themselves they would not amount to an estoppel.

II. The petition in equity, filed after the motion to direct a verdict was argued, was for reformation of the contracts because of mutual mistake, or for mistake on the part of the insured superinduced by the fraud of the defendant. It was filed after at least three attempts to amend the petition at law to make out a cause of action for the same fraud, and after a second trial of the case had progressed to the point where both parties had rested and defendant had filed a motion

6. ACTIONS:
transfer on
calendar: mo-
tion: timeli-
ness.

for a directed verdict. Plaintiff did not then dismiss her law case without prejudice, but simply asked to have the case transferred to the equity docket, and that she be given ten days to file a new substituted petition, and that the cause be continued for that purpose and assigned for a given day at the next term of court. This motion was overruled, and, two days after the verdict was returned, plaintiff filed a motion for a new trial, accompanied by a long petition in equity. The motion for a new trial was overruled and judgment entered on the verdict.

It is manifest there was no error in any of these rulings. In fact, unless plaintiff dismissed her law case, it was the duty of the trial court to dispose of it; for no motion for a postponement was filed. Had such a motion been filed, there was no ground for it; for plaintiff was not proposing to either dismiss or to try her law case to a jury again. She simply wished to take it away from a jury at that time and to have the whole matter tried upon a new petition in equity to the court. Such procedure would have been unusual, and the trial court was surely not bound to grant the request; at best, it was a matter within the sound discretion of the court, and we see no abuse of that discretion.

We have had great difficulty in arriving at the facts, and now that we have finished, are not certain that we have covered them all. The case is unusual, and in one respect a hard one; and yet it must be remembered that none of these companies, unless it be the defendant, was upon a substantial basis. They each failed; and, but for these reinsurance contracts, Garretson would not only have lost all his premiums paid, but would have had no insurance whatever. He was paying but \$12.00 annually for each thousand dollars of insurance, if plaintiff's version is correct, and it is manifest that, if all were carried at that rate, he had very temporary insurance. Many of the mutual companies and a legal reserve company could not have lasted long at that rate.

The insured was born in the year 1833 and, at the time he took out his first policy, in the year 1893, was sixty years of age. He was seventy years of age when first insured by defendant, and seventy-seven years old when defendant became responsible on its second contract. He was beyond the ordinary insurable age when he was reinsured into the defendant company. It accepted him on the basis of giving insurance for what his premium would buy, waiving the question of age. He paid the defendant company about \$400, and his beneficiary receives \$308.27, with interest. This may not be entirely equitable, but it seems to be in accord with defendant's contracts.

We see no reason for disturbing the judgment below, and it must be and it is *Affirmed*.

EVANS, C. J., DEEMER, WEAVER and PRESTON, JJ., concur.

JOHN W. IRVING, Appellant, v. LEWIS WAGNER, Appellee.

SPECIFIC PERFORMANCE: Contracts Enforceable—Delivery on

- 1 **Condition—Performance.** A contract to buy certain land, executed and delivered on the condition that the vendor will effect an exchange of other land belonging to vendee for certain lands belonging to a third party, is not enforceable when said exchange progressed no further than the signing of a contract by vendee and said third party and the repudiation of said contract, under the terms thereof, by both parties, after examination of the land.

SPECIFIC PERFORMANCE: Contracts Enforceable—Inducing Con-

- 2 **tract by Fraud—Representations as to Value.** Representations of *value*, made for the purpose of having them accepted as of fact and to be relied on, are representations of *fact*, and, if actually relied on and false, will defeat specific performance.

APPEAL AND ERROR: Rules—Failure to Obey—Immaterial Amend-

- 3 **ment to Abstract—Costs.** When appellant has not testified contradictory to appellee in any respect, an amended abstract which

sets forth evidence tending to show appellant's bad moral character and bad reputation for truth and veracity will be taxed to appellee.

Appeal from Greene District Court.—F. M. POWERS, Judge.

TUESDAY, APRIL 4, 1916.

SUIT in equity to enforce specific performance of a contract for the sale of real estate, the plaintiff being the vendor. The defendant answered with a general denial; averred that the contract was never delivered except conditionally; and averred that it was obtained by the plaintiff by false and fraudulent representations. There was a decree dismissing the petition, and the plaintiff has appealed.—*Affirmed.*

E. G. Graham, for appellant.

Howard & Sayers, for appellee.

EVANS, C. J.—The affirmative defense that the delivery was conditional only was admitted by plaintiff in a reply, with a further averment, however, that the condition had been complied with, and a further averment that, subsequent to the date of the contract, it had been orally agreed between the parties that the said written contract should be deemed in force. The case as made in the record is unique, in that it presents no debatable question either of law or of fact. Putting the facts briefly, the plaintiff was a real estate agent and was acting as such for the defendant in the proposed sale of certain tracts of land owned by the defendant in South Dakota and Texas. He purported to have found a purchaser in one Forbes, who also had real estate to be turned in the exchange. The plaintiff was himself the owner of a piece of property which is the real estate involved in this suit. He advised the defendant that he wanted to turn in his own property in the deal with Forbes. On October 25, 1913, he came to the defendant while the defendant was engaged in husking

corn in his cornfield, and advised him that, in order to turn his town property to Forbes, he would need to have the title thereof in the defendant, Wagner, in order to include the same in the proposed deal with Forbes. He had a contract drawn up for that purpose and ready for signature, and this is the instrument which is now sued on. This contract named a purchase price of \$2,500. He asked the defendant to sign the same. The defendant hesitated, but yielded upon the certain assurances of the plaintiff. The defendant had never seen the property and knew nothing about its value. The plaintiff assured him that it was worth the amount named, and that he would turn it in the deal with Forbes at \$3,000. He also assured the defendant that, if defendant would sign the same for the purpose of plaintiff's present use in negotiating with Forbes, he (plaintiff) would hold the same unsigned by himself and in abeyance until after he should realize \$3,000 therefor from Forbes. By the undisputed evidence, the property was in fact worth less than \$700. The plaintiff thereupon proceeded to negotiate an exchange between defendant Wagner and Forbes. Neither of them knew anything about the property of the other. Upon representations of plaintiff to each of them concerning the property of the other, he obtained the signature of each to a tentative contract of exchange and sale, which was saved by the following proviso:

"Each party to this contract reserves the right to rescind this contract without damages, upon giving the other party notice in writing within 10 days from the date hereof."

This contract was followed by an immediate examination by each party of the property offered to him. Such examination proved so disappointing to each that he immediately notified the other in writing of his repudiation of the contract.

The procuring of the signatures of the parties to this tentative contract is relied upon by the plaintiff as a performance of the condition upon which the contract between him and Wagner was delivered.

I. The evidence in the case is brief. The plaintiff intro-

duced in evidence his contract and testified to the execution thereof and to his own tender of performance, and rested.

The defendant introduced evidence in support of his affirmative defenses substantially as above narrated. None of this evidence was contradicted by the plaintiff. Manifestly, the affirmative defenses are clearly established.

The avoidance pleaded in plaintiff's reply has no evidence in its support. The tentative contract was not a performance of the condition which the plaintiff's reply pleaded. We need not analyze the nature of such tentative contract as a whole. For the purpose of our present consideration, it is enough to say that, while it included the plaintiff's town property in the proposed conveyance to Forbes, it did not fix a price of \$3,000 upon it, nor did it specify any other price. Such property was simply included in the contract with the defendant's property at a lump price of \$41,100.

Moreover, the representations as to value and their falsity were conclusively proved. Plaintiff did not, as a witness, deny the representations nor attempt to support them as true. They

were egregious in their falsity. This defense is disposed of in the brief of appellant with the suggestion that these alleged false representations were merely representations as to value, and were therefore not fraudulent. The distinction thus suggested has its use in an appropriate case. That it is not available in such a case as we have herein, see *Hetland v. Bilstad*, 140 Iowa 411; and *Mattauch v. Walsh Bros.*, 136 Iowa 225.

No useful purpose can be subserved by an extended discussion of the evidence. Plaintiff's case has the unmistakable odor of pus, and we are not disposed to dwell upon it longer than is necessary to ascertain its merits. We find no merit in it.

II. The defendant appellee has filed an amended abstract, wherein he has set out the impeaching testimony of

1. SPECIFIC PERFORMANCE: contracts enforceable: delivery on condition: performance.

2. SPECIFIC PERFORMANCE: contracts enforceable: inducing contract by fraud: representations as to value.

several witnesses to the effect that the plaintiff had a bad reputation for truth and veracity and moral character. Such amendment shows also that all such testimony was objected to by the plaintiff on the ground that the plaintiff had not as a witness testified contradictory to the defendant in any respect and was not intending to do so.

We are at a loss to discover just what function this testimony had at the particular stage of the trial when it was introduced, it being true, as urged in plaintiff's objection, that he had not, as a witness, contradicted the defendant at any material point; and he did not in fact contradict him thereafter. It is possible that, as a military maneuver, this line of action could be justified as a "curtain of fire" to prevent the plaintiff from bringing forward his supporting testimony. Having served that function, we are still at a loss to discover why it should have been brought into this record by an amended abstract of the appellee, unless it is supposed that this court would be disposed to do less than justice to a bad man, or more to one who had a bad adversary. Even the *code duello* does not permit the shooting of an adversary after he has fallen. The amended record by appellee has served no other purpose here than as a quasi mutilation of a dead body. No costs will be taxed for the amended abstract.

The decree entered below will be—*Affirmed*.

DEEMER, WEAVER and PRESTON, JJ., concur.

RUDOLPH LEHFELDT, Appellant, v. ARNOLD BACHMANN,
Appellee.

WATERS AND WATERCOURSES: Easement—Evidence—Sufficient. Evidence reviewed and held insufficient to establish a contract for the construction and maintenance by adjoining landowners of an artificial watercourse.

WATERS AND WATERCOURSES: Easement—Degree of Proof.
2 Easements in artificial watercourses at war with the order of

nature should only be established by evidence which is clear and satisfactory.

EASEMENTS: Adverse Possession—Use—Claim of Right. Use alone
3 will not establish an easement in real estate. There must be a
claim of right, independent of use, and with knowledge of such
claim on the part of the one against whom the easement is sought
to be enforced. (Section 3004, Code, 1897.)

Appeal from Crawford District Court.—F. M. POWERS, Judge.

TUESDAY, APRIL 4, 1916.

ACTION in equity to enjoin defendant from interfering with plaintiff in the enjoyment of an alleged easement for the maintenance of a ditch over and across a tract of land owned by the defendant. Upon trial to the court, plaintiff's petition was dismissed, and defendant was granted affirmative relief by injunction restraining plaintiff from interfering with the natural flow of water. The plaintiff appeals.—*Affirmed.*

J. P. Conner, for appellant.

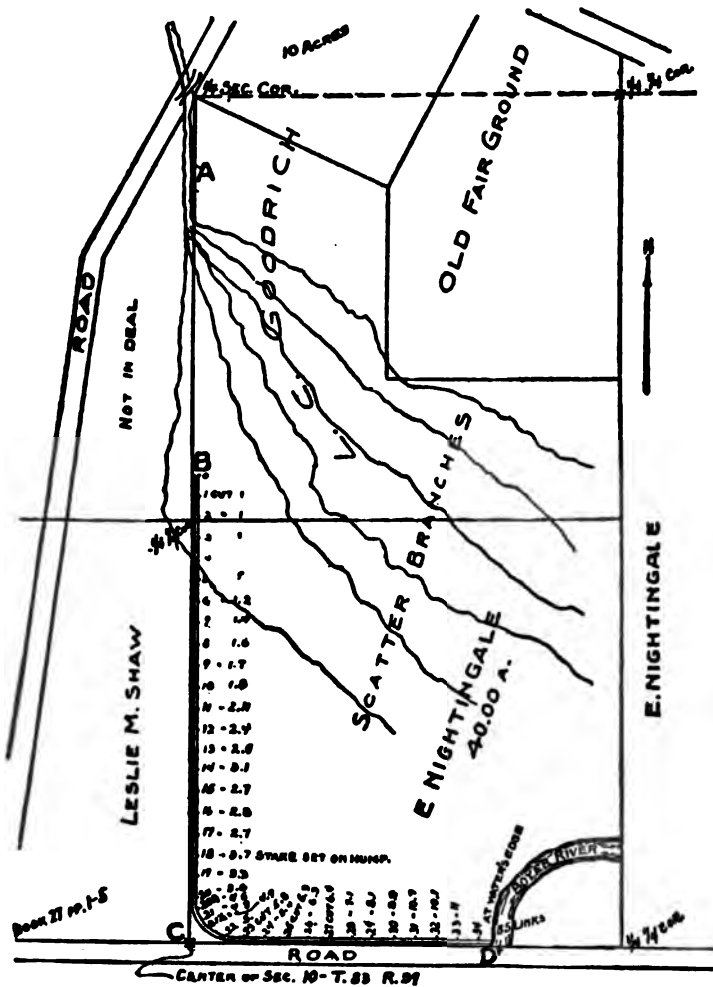
Sims & Kuehnle, for appellee.

WEAVER, J.—This action was begun in June, 1909, but was not brought to trial and judgment for nearly five years. That counsel were not idle during all these years is demonstrated by the fact that the conflicting claims and demands of the parties have grown and expanded through petition; answer; cross-petition; amendment to petition; amended and substituted cross-petition; amendment to amendment to petition; amendment to answer to amended and substituted cross-petition; amendment to amended and substituted cross-petition; amended and substituted and supplemental answer and cross-petition; and an answer to the amended substituted and supplemental cross-petition. There was more or less fencing with injunctions and counter-injunctions, interlocutory motions and orders, with the result that, if the court has not been "lost in an impenetrable forest," it is at least compelled to break

its way through a very dense thicket, which might well have been avoided with a little more care by counsel in pleading, or by an order of the trial court requiring the issues to be rewritten and stated in a petition, answer and reply—and no more. We shall make no attempt to formally state the substance of the volume of pleadings to which we have been referred, but proceed at once to state those facts which are conceded or are shown without dispute, as well as other material matters which the evidence tends to show, and the conflicting claims of the parties in relation thereto will be developed, as we proceed.

The ownership of the lands, their location and natural slopes, will be better comprehended by reference to the following cut.

The plaintiff is the owner of the lands marked on the plat with the names of his grantors, L. C. Goodrich and E. Nightingale, and defendant is the owner of the smaller tract marked "Not in the deal," west of the Goodrich tract. Most of the water which is the cause of the trouble comes out of the higher lands or hills on the north, through a channel which crosses the highway immediately west of the northeast corner of defendant's lands, continuing south a little west of his east line for a short distance, where it reaches a low and comparatively flat area, and where, if left without interference with natural conditions, it ceases to run in a single defined channel, but scatters and spreads southeast over plaintiff's land in the direction of the Boyer River. In the year 1884, Shaw, Nightingale and Goodrich, then owning the three tracts marked with their names, united in constructing a ditch, which is designated by the witnesses as the "Shaw Ditch," or "Shaw-Nightingale Ditch," beginning at "B" on the north, thence south to "C," and thence east to the river. The northern terminus was on the Goodrich land, just south of the south line of the land now owned by defendant, and the ditch continued south and east, as above mentioned, the entire distance on the Nightingale land, but close to the boundary line. At some time after the



the boundary line all the way until it approached the Shaw land, where, as we understand the record, it opened into a ditch on the east side of the Shaw land, and thence into the Shaw-Nightingale ditch. The purpose of this ditch evidently was to catch the waters coming down the channel from the hills, before they debouched upon the flat lands to the southeast, and carry them west into the Shaw ditch. It appears that, when the Shaw ditch was made, the tract now owned by defendant belonged to some absent or non-resident person who had no hand in that improvement. Defendant's title to his land is traced no further back than to one Johnson, who seems to have acquired the property in 1893. Johnson testifies that, when he bought it, there was a ditch across the east side of this 30 acres, and that, during the time of his ownership, the ditch filled up, and plaintiff reopened it or cleaned it out without objection on the part of the witness. Johnson sold to one Cook, who testifies to the existence of the ditch when he purchased, and says that, during the time he owned the land, the ditch, especially toward its southern end, frequently filled with mud and rubbish. Some of the time he cleaned it out himself, and sometimes the plaintiff cleaned it. Defendant appears to have bought the land about the year 1905. Plaintiff became the owner of the Goodrich land in 1891 and says the ditch in question "was there as it is now." Speaking of himself and the defendant's immediate grantor, he says they both worked in clearing the ditch, and that "this was satisfactory to both of us." Disputes soon arose between plaintiff and his tenant on one hand and the defendant on the other, over the right of the former to keep up the ditch on the land of the latter, and these disputes culminated in the bringing of this action, in which plaintiff alleges his right to maintain the ditch and prays an injunction restraining defendant from interfering with it. Most of the evidence was taken early in the litigation, but for some reason, the issues were not pressed to submission for several years. With the case thus pending, in the year 1913, the plaintiff proceeded to put up a tight

board barrier or fence on the boundary line between his land and the defendant's land, extending from "B" to "A;" that is, from the north end of the Shaw ditch to and beyond the point where the water coming down the channel from the hills tends to break away and scatter. This barrier he reinforced with banking, with the evident intention of checking or turning from his land any water which might escape from the ditch. This act on his part was pleaded by the defendant in a supplemental answer and cross-petition, and an injunction prayed against the maintenance of such obstruction.

The court, as already indicated, found that plaintiff had acquired no easement for the maintenance of the ditch on defendant's land, and dismissed the petition, and further enjoined the plaintiff from interfering with the flow of water in its natural course.

The principal question raised by the appeal is whether plaintiff made a case entitling him to equitable relief. In his original petition, he alleged as the basis of his claim an express

written agreement between one of his grantors
1. WATERS AND WATERCOURSES: (not naming him) and one of defendant's
easement; evi- grantors (not naming him), while they still
dence: suffi- were owners, by the terms of which they
ciency. mutually dug, and thereafter, until defendant acquired title
to his land, mutually maintained the ditch in controversy;
and that defendant purchased the land, with notice of plaintiff's rights in the premises. A year later, the petition was amended to show that the then owner of the land now owned by defendant was not a party to the alleged contract, but that thereafter, said land came into the ownership of defendant's grantor, Johnson, who entered into an oral agreement with plaintiff by which said Johnson and plaintiff should together keep and maintain the ditch, and that this agreement was kept and performed by both parties. Plaintiff further alleges that the intermediate grantees through whom the title passed from Johnson to defendant concurred in such agreement and united with him in maintaining the ditch. Later, plaintiff again

amended his petition, alleging anew the making of an express agreement between the parties in interest for the making and maintenance of the ditch.

As we read the record, there is an entire failure of evidence to sustain the allegation that the ditch was originally constructed under or pursuant to any express agreement between the grantors of the plaintiff and the grantors of the defendant. Of defendant's grantors, only Johnson and Cook appear as witnesses; and, though called by plaintiff and testifying in his behalf, neither of them say that they ever had any agreement with plaintiff granting him the right to construct or maintain the ditch. Each swears that, when he bought the land, he found the ditch there, and the showing of his acquiescence therein is confined to the fact that he allowed plaintiff to clean out the ditch without objection.

Even plaintiff himself as a witness does not pretend to say that he ever made or had any agreement with Johnson, as alleged in his pleadings. The extent of his statement on the witness stand is that, while defendant's grantors, Johnson, Cook and Sonksen, were successively in possession, each joined with him in caring for the ditch. No other witness professes to have any knowledge of such a contract. Can we infer or imply such an agreement from the circumstances? We think not. In the absence of credible testimony to the making of such agreement, it is hardly a reasonable supposition that the owner of land situated as is that of defendant would enter into such a stipulation. His land as it stood in a state of nature had the higher elevation, and he was entitled to have the surface waters upon his premises drain across the land of plaintiff. It is conceivable, however, that in a neighborly spirit he might consent to have a ditch made on the boundary line; but it would be very unusual that such an owner would consent to have his neighbor cross over the line and construct and perpetually maintain an open ditch parallel to the boundary line and from one to two rods there-

2. WATERS AND
WATERCOURSES:
easement: de-
gree of proof.

from across his premises, thereby removing from the possibility of practical cultivation not only the area occupied by the ditch itself, but also the added area between the ditch and the partition line. This is not the somewhat familiar case where owners of adjoining tracts enter into a joint or mutual enterprise whereby one or more ditches beginning upon the land of one party are, for their mutual advantage, extended into or across the land of the other, an undertaking which, under all ordinary circumstances, the law will protect and encourage. Here, however, the plaintiff, owning a tract of land so situated that it is charged with the burden of receiving and caring for the entire flow and drainage coming down the channel from the hills, is asserting a right to enter upon the higher land of his neighbor and there construct and maintain a ditch to divert this flow and drainage in another direction across the higher land. In other words, the right which he asks the court to establish and enforce is to invert the order of nature and the rule of law which recognizes it, and by a decree in equity change the servient into the dominant estate. It is certainly but right that, before such extraordinary relief is granted, he who asks it be required to establish the facts justifying it by clear and satisfactory evidence.

Nor can we discover any ground upon which to find a title to the alleged easement by adverse possession. The mere fact that plaintiff has used the ditch for a long time—though more than ten years—is not sufficient. Our statute,

3. EASEMENTS:
adverse possession:
use:
claim of right.

Code Section 3004, provides that such use is not even competent evidence of the grant of an easement or of a claim of right, but such claim or assertion of right must be established by evidence independent of its use. When we take from plaintiff's evidence all that relates to the matter of the use and enjoyment of the ditch, there is very little left of the showing made by him. If it be claimed that there is proof that the owner of the land knew of such use, it must still be shown, in order to avoid the

effect of the statute, not only that the party claiming the easement had continued in its use for more than ten years with the knowledge of the owner, but it must also further appear that the owner knew that use was adverse under color of title or claim of right. *Preston v. Hull*, 77 Iowa 309; *Friday v. Henah*, 113 Iowa 425; *McBride v. Bair*, 134 Iowa 661; *Zigfoose v. Zigfoose*, 69 Iowa 391. Or, as has been said by us in the *McBride* case, *supra*:

“There must have been a claim of right independent of the user, of which the defendant or those under whom he holds had express notice.”

While plaintiff in this case does show a use of the ditch with the knowledge of the owners of the land, there is no testimony, not even by himself, that he ever informed any of the owners that he claimed anything more than a revocable license therefor until after defendant purchased the land in 1905, and trouble arose between the parties, or between defendant and plaintiff's tenant.

Other evidence to which we have made no reference has no tendency to show that the ditch was originally constructed by the mutual act or agreement of the parties or their grantors, or that it was constructed under an express agreement or understanding that the owners of the land now held by plaintiff thereby acquired a perpetual easement for its maintenance.

The decree below was right and it is—*Affirmed*.

EVANS, C. J., DEEMER and PRESTON, JJ., concur.

STATE OF IOWA, Appellee, v. JAKE MILLER AND JOHN MILLER,
Appellants.

CRIMINAL LAW: Trial—Joint Defendants—Form of Verdict. It is reversible error to submit, in a joint trial of joint defendants, forms of verdicts which require a joint conviction or a joint acquittal, the evidence against the defendants being materially different on the question of guilt. (Sections 3730, 5384, Code, 1897.)

Appeal from Hardin District Court.—R. M. WRIGHT, Judge.

TUESDAY, APRIL 4, 1916.

DEFENDANTS were jointly indicted for the crime of keeping a liquor nuisance. Verdict of guilty, and from the judgment imposed, they appeal.—*Reversed and Remanded.*

E. H. Lundy, Dean W. Peisen and W. H. Soper, for appellants.

George Cosson, Attorney General, John Fletcher, Assistant Attorney General, and C. A. Bryson, County Attorney, for appellee.

DEEMER, J.—Defendant Jake Miller owned a restaurant and lodging house in the city of Iowa Falls, which was conducted by his son, John Miller, and they were jointly indicted for the crime of keeping and maintaining a liquor nuisance therein. They each entered a plea of not guilty, and upon trial, were convicted of the offense charged. There was enough testimony, if believed by the jury, to justify a conviction of John Miller for actual sales of liquor in the building; but no testimony whatever that Jake Miller made any sales therein. The only thing on which the latter might have been found guilty was that he knew intoxicating liquors were being kept for sale or were sold in his building contrary to law, and that he thus approved of or ratified the sales. This he squarely and absolutely denied, and he also testified that he took extra precaution against the sale or keeping for sale within the building of any intoxicating liquor of any kind whatever. There may have been enough testimony, however, for the state to convict him on this theory; but the court in its instructions said:

“I give you two forms of verdict, and when you go to your jury room, you will select one of your number as foreman. Your verdict should be reduced to writing, and signed

CRIMINAL LAW:
trial: joint de-
fendants: form
of verdict.

by your foreman. If you find in favor of the State, your foreman will sign the first form of verdict. If you find the defendants not guilty, your foreman will sign the second form of verdict."

These forms were:

"We, the jury in the above entitled cause, do find the defendants guilty as charged in the indictment.

....."

or,

"We, the jury in the above entitled cause, do find the defendants not guilty.

....."

No other form was submitted; and under the instructions, the jury was not authorized to find one defendant guilty and the other not guilty.

In this, we think there was error which calls for a reversal of the judgment. Under our Code Sec. 5384, "Upon an indictment against several defendants, any one or more may be convicted or acquitted." See also *State v. McClintock*, 1 G. Gr. 392.

The effect of this statute is to make an indictment against two or more both joint and several, as the facts may warrant; but the verdict should be so molded as to accord with the facts and meet the exigencies of the case. Code Sec. 3730. Had the testimony been the same as to each defendant, doubtless no presumption of prejudice would arise. But that is not the situation here. Under the instructions, a jury was justified in concluding that, if they found John Miller guilty, they should also find his co-defendant guilty with him. Again, some of the jurors might have insisted that, if the State failed to show either guilty, neither should have been convicted. In other words, there was no room for an intelligent solution of the problem of what the jury may have actually found as to defendant Jake Miller. Courts of other states have held

that such an instruction, or direction to a jury, is erroneous. *Hayden v. Nott*, 9 Conn. 366; *People v. McGrath*, 5 N. Y. Cr. R. 4; *Hampton v. State*, 45 Tex. 154. Defendants made the point in their motion for a new trial and in arrest of judgment, saying that, in the hurry of the trial, they overlooked the error, but immediately discovered it after the verdict was returned. Other rulings were correct or are not likely to arise on retrial; but for the error pointed out, the judgment must be reversed.—*Reversed and Remanded.*

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

J. M. WHITE, Appellant, v. F. C. HARVEY, Appellee.

ELECTION OF REMEDIES: Acts Constituting Election—Vendor

- 1 and Purchaser—Rescission of Contract. A vendee in a contract of sale of real estate who, in an action of specific performance brought by the vendor, asks for and receives a *cancellation* of the contract and judgment for payments and improvements made, thereby makes an irrevocable election of remedies, and may not, subsequently, maintain an action to recover *damages for loss of his bargain*.

JUDGMENT: Matters Concluded—Splitting Cause of Action. An

- 2 adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had determined as incident to or essentially connected with the subject matter of litigation. So held where a vendee in a contract of sale obtained by reason of the vendor's failure to convey, a judgment for payments made on the contract and for improvements made on the property, and *subsequently*, and in a new action, sought to recover *damages for loss of his bargain*.

JUDGMENT: Validity—Burden of Proof—Presumption. He who

- 3 claims that a judgment is invalid because the entire proceedings were had in vacation has the burden of proof to make such fact affirmatively appear of record. It will be presumed that the judgment was rendered in term time. So held where the record showed an appearance by the defendant and a trial *by the court*.

EVIDENCE: Judicial Notice—Terms of Court—Final Adjournment.

4 This court will not take judicial notice of the time of the final adjournment of a term of the district court.

JUDGMENT: Validity—Estoppel by Accepting Benefits. A judg-

5 ment plaintiff who has accepted the benefits of the judgment may not thereafter question its regularity.

Appeal from Greene District Court.—M. E. HUTCHISON,
Judge.

TUESDAY, APRIL 4, 1916.

ACTION at law to recover damages for breach of a contract to sell and convey certain lands. Defendant filed a general denial, and also pleaded a prior judgment as a bar to the proceeding. Plaintiff demurred to that part of the answer pleading the judgment and decree in defense to this action; but the demurrer was overruled, and plaintiff electing to stand thereon, judgment was entered dismissing his petition, and he appeals.—*Affirmed.*

Henry & Henry, for appellant.

Church & McCully, for appellee.

DEEMER, J.—I. On August 15th, 1913, the parties hereto entered into a written contract whereby the defendant undertook to sell and convey to plaintiff a certain tract of land in Greene County, Iowa, for the agreed consideration of \$16,567.20. The contract was to have been performed on March 1, 1914. Defendant agreed to furnish an abstract showing perfect title and to convey the land by warranty deed. When the time came for the delivery of the deed, it was discovered that defendant did not have perfect title, and plaintiff refused to accept such as he (defendant) had. In July of the year 1914, defendant herein commenced a suit against plaintiff to reform a certain deed in his chain of title and to compel specific performance of his contract with plaintiff herein, making the parties to the deed sought to be reformed, the plaintiff herein and other parties, defendants.

Plaintiff herein appeared to that suit and admitted the execution of the contract between him and the defendant herein; pleaded that he had paid \$1,200 of the purchase price for the land; and also averred that defendant herein was unable, because of defects in his title, to convey the land as agreed. He also averred that, pursuant to the contract, he had entered into the possession of the land and had expended something like \$500 in laying tile drains through and upon the land. He therefore asked that the contract be cancelled, set aside and held for naught; that he have judgment against the plaintiff (defendant herein) for the amount paid on the purchase price, to wit, \$1,210, with six per cent. interest from date of contract, and for the value of the tile drains constructed by him on the premises. Plaintiff in that suit (defendant herein) filed a reply denying the allegations of the answer and cross-bill; and on the issues thus joined, the case was tried to the court, resulting in a decree cancelling the contract of sale and denying the specific performance thereof, and awarding to the defendant (plaintiff herein) judgment for the amount of the consideration paid and for the value of the tiling constructed, amounting in the aggregate to \$1,787.60 at the time the decree was rendered. No appeal was taken from this decree, and plaintiff has received the amount awarded him.

This action was commenced by plaintiff, the vendee of the land, to recover damages for defendant's failure to comply with the terms of his contract to sell and convey, and the only question presented by the demurrer is his right to recover damages for the loss of his bargain, the land being worth much more on March 1, 1914, than the plaintiff agreed to pay for it. Plaintiff contends that the decree of cancellation and judgment entered in the original case is no bar to his present suit, although the contract was cancelled and set aside in that action and he was awarded a judgment for the amount he had paid for the land and for improvements placed thereon; because, in any event, he is entitled to be made whole and to recover for the loss of his bargain. On the other hand, it is

insisted that plaintiff herein had the right to rely on his contract and sue for the breach thereof, recovering all damages he suffered in consequence of its breach, or to rescind the contract and be placed *in statu quo* by securing the return of the money he had paid, with interest, and being reimbursed for all expenditures incurred; but that he could not do both. It is also claimed for defendant that plaintiff in fact elected to rescind and to recover his damages in the original suit, and that he should have asked in that suit for all the damages to which he believed he was entitled, and that he could not split his causes of action and in one suit recover part of his damages, and in another assert that he suffered still more, which he did not claim in the original suit. As will be observed, the issues are narrow ones and resolve themselves down to simple legal propositions regarding the rights of a vendee under a contract for the purchase of real estate where the vendor is unable or unwilling to comply with the terms of his agreement. It is conceded that there was such a defect in the title to the land that defendant was unable to comply with the terms of his contract, and that this has been conclusively established in the prior action; and the underlying proposition is: What were the rights and remedies of the purchaser when he found that the vendor could not or would not comply with the terms of his agreement?

Of course, a remedy is always available to a party to an executory contract which cannot or should not be enforced, because of illegality, fraud or mistake. This remedy may be rescission, in which event the party without fault may have the contract cancelled on account of the wrong or default of the other, and recover the amount of purchase money paid, with interest; the value of permanent improvements or repairs made by him; and taxes paid, if any. *Bryant's Executor v. Boothe*, 30 Ala. 311; *Coffman v. Huck*, 24 Mo. 496; *Outlaw v. Morris*, 7 Humph. (Tenn.) 262. Or he may have his damages for breach of the

1. ELECTION OF REMEDIES: acts constituting election: vendor and purchaser: rescission of contract.

contract, which may include loss of his bargain; but he cannot have both. *Strong v. Strong* (N. Y.), 5 N. E. 799. The reason for this rule is that the remedies are inconsistent; in the one case the contract is affirmed and damages are asked for its breach; and in the other, it is disaffirmed, rescinded and held for naught, and the parties are simply placed *in statu quo*. *Swayne v. Waldo*, 73 Iowa 749; *Fagan v. Hook*, 134 Iowa 381; 3 Elliott on Contracts, Sec. 2097; *Campbell v. Moorehouse*, 141 Iowa 568; *Bowen v. Mandeville*, 95 N. Y. 237; Bishop on Contracts, Secs. 826-827. One action proceeds on the theory of a tort and the other on breach of contract, and the damages to be awarded are different. In the one case they are governed by the amount stipulated in the contract, and in the other by the difference in the value of the property. *Piersall v. Huber Mfg. Co.* (Ky.), 167 S. W. 144; *Wheeler v. Dunn* (Col.), 22 Pac. 827.

Again, it is a well-settled rule that an injured party can recover but one satisfaction for the injuries he has sustained, no matter how many actions he may be entitled to prosecute for their recovery. In other words, he cannot, if he elects to recover damages, have part of them assessed in one action and the remainder in another; he cannot thus split his causes of action. Furthermore, where the vendor is guilty of no fraud, but had no title and the contract is incapable of performance, the vendee is entitled to the return of the purchase price with interest, and also to be reimbursed for improvements, and this is the extent of his recovery. *Beard v. Delaney*, 35 Iowa 16; *Foley v. McKeegan*, 4 Iowa 1; *Stewart v. Noble*, 1 G. Gr. 26; *Sawyer v. Warner*, 36 Iowa 333. There is no doubt of the right of the defendant in the main suit (plaintiff here), to recoup his damages against the plaintiff therein (defendant here), although the action was in equity for the specific performance of the contract; but if he elected to do this, it was his duty to allege and prove all the damages which he claimed to have suffered, and not leave the matter

2. JUDGMENT:
matters con-
cluded: split-
ting cause of
action.

open to a subsequent suit. This is based on the fundamental thought that one cannot split his causes of action, and it matters not that he did not plead the specific items of damage in the former suit. *Smith Lumber Co. v. Sisters of Charity*, 146 Iowa 454; *Hogle v. Smith*, 136 Iowa 32; *Stodghill v. Chicago, B. & Q. R. Co.*, 53 Iowa 341.

II. In order to meet these propositions, which we think are fundamental, plaintiff contends that the judgment in the main case is void and of no effect, because that action was commenced and decided in vacation, and the decree is for that reason extra-judicial. The trouble with this contention is that it does not affirmatively appear of record that all the proceedings were had in vacation or that the decree was without jurisdiction in the court rendering it.

It may be that we will take judicial notice of the beginning of all terms of court within the several counties of the state; but we surely do not take judicial notice of when they are closed, nor of the adjournments thereof.

4. EVIDENCE: judicial notice: terms of court: final adjournment. The record shows an appearance of the plaintiff herein (defendant in that suit) in open court, a trial therein, and a decree of the court, and not of a judge. Of course, the action may have been commenced either during term time or in vacation, and the only questions which could arise as to a defendant's appearing to the suit were whether he appeared before the judge in vacation, or whether the decree was entered in vacation. The plaintiff must show the affirmative of these propositions, and he has failed to do so. Hence we must presume that the record speaks the truth: that defendant appeared and that the decree was rendered by the court in term time. It may, as we have suggested, have been at an adjourned term of court, and it is not material that the defendant could not have been required to appear at that term, either regular or adjourned. He did appear, and that is an end of the inquiry. *Reed v. Lane*, 96 Iowa 454.

However, the record shows that a decree was rendered on the issues joined, and that plaintiff accepted and received the money awarded him. So that, even if the decree were unauthorized in the first instance, plaintiff herein

5. **JUDGMENT:** (defendant in that suit) is in no position to
 validity: estop-
 pel by accept-
 ing benefits. attack the decree. *Mohler v. Shank*, 93 Iowa 273; *Sweezy v. Stetson*, 67 Iowa 481. Again, the record discloses that defendant in the main suit made an election of his rights; that is, his right either to rescind and treat the contract as abrogated, or to maintain it and sue for his damages; and although the case had not yet passed to a proper decree and judgment, he cannot, especially in view of his acceptance of the money from the plaintiff (defendant herein) now change front and ask for damages. This is squarely ruled by *Harding v. Olson*, 177 Ill. 298, wherein it is said:

"The filing of the bill by the appellee was a complete election upon his part to rescind the contract, and conferred upon the appellant the right to relieve himself of all obligations under it by the payment of money, instead of specifically performing it."

On the whole record, the ruling on the demurrer seems to be correct, and the judgment must be and it is—*Affirmed*.

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

H. W. EMEY AUTO COMPANY, Appellee, v. J. NEIDERHAUSER,
 Appellant.

EVIDENCE: Books of Original Entry—Ledger Pages—Workmen's
 1 Slips.

a. "Ledger pages," being copies of workmen's slips, are not books of original entry and not admissible as such.

b. "Workmen's slips," if shown to be the original entries of the transactions, and made in due course of business and at the times of the several transactions, are not rendered inadmissible, as books of original entry, because not bound in book form, speci-

ally when supplemented by statements of account sent to defendant and retained by him without objection.

ACCOUNT, ACTION ON: Pleading—Quantum Meruit—Agreed Price

- 2 —**Variance—Evidence.** In an action for balance due on account, an allegation that plaintiff sold and delivered to defendant, at defendant's instance and request, all the items charged, and that they were of the value and amount of the sum total of all the items, is broad enough to justify the reception of evidence that any single item was sold at an agreed price.

ACCOUNT, ACTION ON: Pleading—Quantum Meruit—Evidence—

- 3 **Agreed Price.** In an action on account for balance due, based on *quantum meruit*, evidence that the parties agreed on the price of a certain item is competent evidence of the reasonable value of the article.

TRIAL: Special Interrogatories—Submission on Motion of Court.

- 4 The court may, on its own motion, submit special interrogatories to the jury, calling for special findings on material and relevant issues. So held in an action on account. (Sec. 3727, Code, 1897.)

TRIAL: Instructions—Issues. Manifestly, the court should not sub-

- 5 mit a question not at issue.

Appeal from Marshall District Court.—B. F. CUMMINGS,
Judge.

WEDNESDAY, APRIL 5, 1916.

ACTION upon account for goods sold and delivered and for repairs to two certain automobiles. The defendant admitted during the trial all but five items of the account, and these he denied. Upon issues joined as to these items, the case was submitted to a jury, resulting in a verdict and judgment for plaintiff and defendant appeals.—*Affirmed.*

C. H. E. Boardman, for appellant.

F. L. Meeker, for appellee.

DEEMER, J.—I. The items of account in dispute are a secondhand Buick automobile, an outer casing, an inner

tube and the repairing of a Cadillac and a Buick car. The purchase of the Buick car is admitted, but it is claimed that in consideration thereof plaintiff was to keep it in repair without expense. The repair work on the Cadillac car is admitted, at least to a certain extent, but the

1. EVIDENCE:
books of original entry;
ledger pages:
workmen's slips.

charges are said to be exorbitant; the furnishing of the casing and tube are admitted, but it is claimed that one was furnished for a car loaned to defendant by plaintiff and that plaintiff has it, and the other is said to have been given defendant in consideration of his taking the secondhand car. The purchase of the secondhand car is admitted, but it claimed that it was bought under an express agreement that it should be satisfactory to defendant; that it did not so prove; and that defendant returned it to plaintiff. To prove the various items in dispute, especially the goods furnished and the repairs done, plaintiff introduced various slips made by employees, certain ledger pages made from these slips and the entries upon the slips as to reasonable prices, or prices agreed upon; and it is said that none of these were admissible, although all were verified by the oaths of the parties making them. Doubtless the ledger pages, being in most instances mere copies from workmen's slips, were not books of original entry, and therefore not admissible in evidence; but the workmen's slips, although not bound in book form, were, under modern rules, receivable as books of original entry. *Graham & Corry v. Work*, 162 Iowa 383; *Gibson v. Seney*, 138 Iowa 383. In this case, these were supplemented by statements of account showing balances due, sent defendant from time to time and kept by him without objection; so that in any event, according to well-settled rules, the testimony was admissible.

II. Plaintiff was a dealer in automobiles and automobile supplies, and among other items shown on its account was a secondhand automobile. The books showed such an item of account, and plaintiff alleged the sale and delivery of all the

items charged at defendant's special instance and request, to the value and amount of the sum total of the items.

The proof tendered showed the sale of the automobile at the agreed price of \$250, and it is claimed that there is a variance between the allegations and the proof, in that the petition counts upon *quantum meruit*, whereas the proof shows a special contract. The proposition does not appear to be sound. The action is for a balance due on account, consisting of several items, and the petition is broad enough to cover the sale of any single item at an agreed price. Indeed, under such a petition, proof of an agreed price for any item included in the account would be proper.

Moreover, if the action were on *quantum meruit*, the agreed price would be evidence of value; and as the action is for balance due on account, there would be no variance between the allegations and the proof. If the action were for a single item and were not founded on a running account, there might be some merit in defendant's contention; but as that is not its form, it is clear that there is nothing in this proposition.

III. The court on its own motion submitted two special interrogatories to the jury. The first one was as to whether or not there was an agreement between the parties to the effect that, if the automobile sold to defendant was not satisfactory to him, he might return it, to which the jury returned a negative answer; and the second, as to whether or not the contract of sale was rescinded by defendant, to which the jury also returned a negative answer.

It is said that the court was not authorized to submit these interrogatories. The first was to meet an issue specially pleaded by defendant, and it was entirely justified. Our Code provides that the court on its own motion may submit special interrogatories to the jury. Code Section 3727. These

2. ACCOUNT, ACTION ON: pleading: quantum meruit: agreed price: variance: evidence.

3. ACCOUNT, ACTION ON: pleading: quantum meruit: evidence: agreed price.

4. TRIAL: special interrogatories: submission on motion of court.

interrogatories were both material and relevant to the issues tendered, and we see no error.

IV. The court did not submit the case on the theory of implied warranty, for the very good reason that no such issue was tendered; and for the further reason that the defendant

did not except to the instructions as given,
 5. TRIAL: instructions: issues. and asked none himself. Without an issue

of that kind, the court would not be justified in submitting such a proposition. This is fundamental law. Moreover, the question does not seem to have been presented to the lower court in any form, so that it cannot properly be raised here for the first time. The answers to the special interrogatories settle the fact issues with reference to conditional sale or breach of express warranty; for there was a conflict in the testimony, and the verdict is conclusive. This same thought is an answer to defendant's contention that there was no consideration for the sale of the automobile.

We have examined the record with care and find no error. The judgment must, therefore, be and it is—*Affirmed*.

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

CHARLES PETERSON, Administrator, Appellee, v. PHILLIPS COAL COMPANY, Appellant.

TRIAL: Reception of Evidence—Order of Proof—Discretion of Court.

- 1 Testimony on the main case may be properly received after argument on motion for directed verdict.

EVIDENCE: Res Gestae—Instinctiveness—Coincidence in Time. On

- 2 the question whether certain matter is *res gestae*, the all-important requisite is *instinctiveness*, not necessarily precise coincidence in point of time.

PRINCIPLE APPLIED: In some manner, a miner got beneath his car and was severely injured. On a cry for help, several miners went at once to his assistance, and he was taken from under the car, placed in an empty car, and driven to the mouth of the mine.

The injured man was conscious, but suffering great pain. From 3 to 10 minutes after the arrival of help, he said: "The mule hit the door frame with his hips and withers and was stumbling all the way down the hill." *Held, res gestae.*

MASTER AND SERVANT: Negligence of Master—Injury—Causal
3 **Connection.** No causal connection between negligence proven and injury suffered, no recovery.

PRINCIPLE APPLIED: Personal injury action. The negligence alleged and, *arguendo*, assumed to be proven, was "that the door to an entry in a mine through which deceased passed was not high enough to permit the mule driven by deceased to pass without striking his withers." Deceased, riding on his car, was seen to pass through the door. After passing through the door, his car would, for 30 feet, pass slightly upgrade, and thence gradually downward for 180 feet. After passing the door, deceased was heard to cry for help. He was found under the car, *210 feet from said door*. While being removed from the mine, he said: "The mule hit the door frame with his hips and withers and stumbled all the way down the hill." *Held*, causal connection between negligence alleged and injury was wholly lacking.

NEW TRIAL: Grounds—Odor of Untruthfulness in Record. An un-
4 avoidable odor of untruthfulness surrounding testimony which manifestly is the *sole* support for a verdict, may be sufficient to demand the *granting* of a new trial and may even justify the appellate court in overturning the action of the lower court in *refusing* a new trial; and this, too, while giving recognition to the rule that the credibility of witnesses and the weight of their testimony is for the jury. So *held*, under exceptional circumstances, where the belated testimony of a single witness, impeached by his own former signed statements and persuasively discredited by the attendant circumstances, supplied, in a personal injury action, the only possible causal connection between the negligence alleged and the injury suffered.

Appeal from Wapello District Court.—C. W. VERMILION,
Judge.

WEDNESDAY, APRIL 5, 1916.

ACTION at law to recover damages on account of the death of plaintiff's intestate, alleged to have been caused by the defendant's negligence. Judgment for plaintiff, and defendant appeals.—*Reversed.*

Parker, Parrish & Miller and C. Woodbridge, for appellant.

J. A. Lowenburg and W. S. Asbury, for appellees.

WEAVER, J.—At the time in question, the defendant was operating a coal mine in Wapello County, and the deceased, Edwin Peterson, was employed therein as a mule driver. At the time of the accident in controversy, he was driving in what is termed the south back entry. His route led through a door constructed between the seventh and eighth entries. On his last trip, he was seen to mount the tail chain in the position usually taken by drivers and start with a loaded car along the entry in the direction of the door above mentioned. He was also seen as he passed through the door. According to an engineer's measurements, the track in the direction deceased was moving was slightly upgrade from the door for about 30 feet, thence a gradual downward slope for about 180 feet to a low point or level, called by the miners a swamp. The total descent is said by the engineer to be less than five feet, though the estimate by some of the witnesses is considerably greater. The entry appears to have been low in places, and the way through it had been narrowed by piling "gob" on either side, leaving in places barely room for hauling cars along the track. Deceased had not been hauling on this particular route for more than a day or two; but he was a driver of several months' experience, and we may fairly assume that he had acquired a reasonably adequate knowledge of the general character and nature of the entry. After he had driven through the door on this last occasion and passed on down the slope, one of the door tenders in the mine heard him cry out or call for help, and responding thereto, the boy went to his assistance, and found him caught or fastened in some way under the car. Whether the car was derailed or was still upon the track is a subject of difference in the recollection of the witnesses. The boss driver, one Murphy, was

near at hand, and, on arriving at the scene of the accident, summoned another driver, Brown, and about the time deceased had been taken from under the car, his brother, Ainer Peterson, arrived. The unfortunate young man was then lifted into an empty car, where he was supported by his brother and Murphy. Brown drove the car to the shaft, whence deceased was taken to the home of his father near at hand, where he died.

The petition in the case charged the defendant with negligence in eight specified particulars: (1) Defective construction of the entry, whereby the passage was too low to afford safe passage; (2) making the entry too narrow and permitting the passage to be further narrowed by piling refuse therein; (3) failing to provide light or other warning in the swamp; (4) defective construction and maintenance of the car tracks; (5) faulty construction of the door between the seventh and eighth entries; (6) failing to furnish deceased a safe place to work; (7) furnishing deceased with an unsafe or vicious mule with which to do the hauling; and (8) transferring deceased from a safe part of the mine to one which was dangerous without giving him proper warning of the risk so occasioned.

At the close of the testimony, the court narrowed the issues by charging the jury as follows:

"The only claim of negligence submitted for your consideration is the allegation that the door in question was not high enough to permit the mule driven by deceased to pass without striking his withers;" and the charge to the jury as a whole was framed upon the theory indicated by the order or direction above quoted. There was a verdict for plaintiff for \$5,500, and, defendant's motion for a new trial having been denied, judgment was entered accordingly.

We do not find any allegation in the petition that the door was not high enough to permit the mule driven by deceased to pass without striking his withers. It is possible, however, that, in the absence of any motion for more specific

statement, the general allegation of "faulty construction of the door" may be considered sufficient to permit the introduction of evidence of the nature indicated by the court; and for the purposes of this appeal, we shall so treat it. The evidence on which plaintiff relies in this respect is as follows: It is shown that the mule driven by deceased was somewhat larger and taller than the average of those used in this work, and was difficult to manage. Some of those who describe it from memory and casual observation only, estimate its height at the withers at 60 inches or more. The height of the door opening as stated by the witnesses, many of whom speak only as a matter of estimate without measurement, varies all the way from 52 to 60 inches. Witnesses for the defense, speaking from alleged actual measurements, say that the height of the mule was 57 inches, and of the door, 60 to 61 inches. The boy who attended the door and was present on each occasion when deceased drove through says he never saw any indication of trouble or difficulty in the passing of the mule through the opening. No living witness undertakes to say that, in the actual use of the door, the mule was ever seen or known to strike the frame, either overhead or at the side. Nor is any living witness produced who is able to point to any connection whatever between the alleged insufficiency of the door opening and the disaster to the deceased at a point more than 200 feet distant therefrom. The needed connection between such alleged cause and effect is sought to be supplied as follows. It will be remembered that the witnesses Brown, Murphy and Ainer Peterson placed deceased in an empty car and carried him to the shaft, Brown driving the car. Ainer Peterson held or supported him in his arms. On the trial, the witnesses named testified to this circumstance in considerable detail. When plaintiff had rested his case, defendant moved for a directed verdict upon the ground of failure of evidence to establish the plaintiff's allegation of negligence or any proximate connection between the alleged negligence and the injury of deceased. When the motion had been argued, and before

ruling thereon, the court, over defendant's objection, permitted plaintiff to recall the witness Brown, who testified for the first time that, while he and Ainer Peterson and Murphy were taking deceased from the place of his injury to the shaft, deceased made the statement that "the mule hit the door frame with his hips and withers and was stumbling all the way down the hill." On the strength of the record as thus amended and perfected, the court denied the motion to direct a verdict, and the trial proceeded to verdict and judgment for the plaintiff.

I. The point is made that, as a matter of proper practice, the court erred in permitting the recall of the witness Brown after plaintiff had once rested and after motion to direct had been submitted. The exception is

1. TRIAL: reception of evidence: order of proof: discretion of court.

not well taken. The court presiding at the trial is in position to see whether the party asking such privilege is acting in good faith and whether the granting thereof is likely

to put his adversary at an unfair disadvantage; and, unless there is a clear case of abuse of discretion, we cannot rightfully interfere therewith. The first purpose of all litigation is to ascertain the very truth of the controversy, and if that purpose is not defeated by a departure from the usual order for the introduction of evidence, the error, if any, will be held to be without prejudice. No mere strategic advantage which enables either party to shut out material and competent evidence ought to be recognized by the court in the absence of some imperative rule requiring it.

II. It is argued with much earnestness that the statement which Brown ascribes to the deceased was not a part of the *res gestae*, and should have been excluded on that ground.

The time which elapsed from the arrival of help until the statement was made was variously estimated at from 3 to 10 minutes.

2. EVIDENCE: *res gestae*: instinctiveness: coincidence in time.

The deceased, though conscious, was still suffering greatly from his injuries; and the succession of inci-

dents, his injury, his outcry, the appearance of help, his release from under the car, his removal toward the shaft and the alleged statement, followed in such quick moving order that we think the matter comes within the rule which admits testimony of statements of an injured party made "in such intimate connection with the event in issue as to make it, in a proper and reasonable sense, a part thereof." The rule concerning the admissibility of such statements as *res gestae* is one upon which the courts have widely differed, not so much upon its abstract statement as upon the degree of strictness or liberality with which it is applied. Some authorities hold quite literally to the proposition that the words offered in evidence must have been spoken at the very time or concurrently with the event, while others hold that the principle extends also to other statements or exclamations made under circumstances indicating that they are the spontaneous utterance of thoughts created by or springing out of the event itself, and so soon thereafter as to exclude the presumption or inference that they are the result of premeditation or design. *International & G. N. R. Co. v. Anderson*, 82 Tex. 516; *Commonwealth v. M'Pike*, 3 Cush. (Mass.) 181. The Supreme Court of the United States, speaking of the proper scope of the rule, says, "generally the declarations must be contemporaneous with the main fact to which they relate. But this rule is by no means of universal application." *Insurance Co. v. Mosley*, 8 Wall. 397. See also *Delaware, L. & W. R. Co. v. Ashley*, 67 Fed. 209, 213; *Augusta Factory v. Barnes*, 72 Ga. 217, 227; *Harriman v. Stowe*, 57 Mo. 93, 96; *Armil v. Chicago, B. & Q. R. Co.*, 70 Iowa 130, 132; *Waldele v. New York Cent. & H. R. R. Co.*, 29 Hun. (N. Y.) 35; *Keyes v. Cedar Falls*, 107 Iowa 509; *Rothrock v. Cedar Rapids*, 128 Iowa 252; *Spevack v. Coaldale Fuel Co.*, 152 Iowa 90. In the *Mosley* case, above cited from the Supreme Court of the United States, the court says of the *res gestae* rule:

"The tendency of recent adjudications is to extend rather than to narrow the scope of the doctrine. Rightly guarded in

its practical application, there is no principle in the law of evidence more safe in its results."

See also to same effect *State v. Harris*, 45 La. Ann. 842, 844. That this court adheres to the broader construction of the rule is readily seen in the precedents above cited. The objection to the evidence as not being *res gestae*, assuming the evidence to have been otherwise competent, was properly overruled.

III. A more serious question arises when we come to consider whether, upon the entire record, including the testimony of Brown, plaintiff made a case upon which the finding of the jury can be maintained. It should be kept in mind that the trial court withdrew from the jury all of the various charges of negligence except the single one concerning the insufficiency of the doorway; and that, unless there was evidence fairly tending to establish the fact of such alleged insufficiency and the further fact that such defective condition was the proximate cause of the injury to the deceased, no recovery can be had. Without Brown's testimony, there is, as we have already intimated, not the slightest evidence to show the relation of cause and effect between the condition of the door or doorway and the fatal injury of the deceased 210 feet distant therefrom. Does his story supply the needed connection? We think not. If the injured man made the statement, it nowhere appears that he made it as an explanation of the way in which he received his hurt. The words which Brown places in his mouth were spoken, if at all, after he had been lifted into the empty car and was 250 feet on his way to the shaft, and Brown himself says they were not spoken in answer to any inquiry concerning the cause of the accident. So all we have is the isolated statement of the young man, not called out by or relevant to any inquiry made of him, that the mule hit the door and stumbled all the way down the hill. There is nothing in the statement to convey the idea, unless it be by mere remote inference, that the alleged

3. MASTER AND
SERVANT: negli-
gence of mas-
ter: injury:
causal connec-
tion.

contact between the animal and the door frame was the cause of the animal's stumbling all the way down the hill. The hill, or descending grade, was not reached until he had passed 30 feet beyond the door; and even if the mule stumbled in making the descent from that point, it requires a fertile imagination to trace the cause of the mule's uncertain footing back to the fact that his withers and hips scraped the door frame as he passed through. Neither is there in the statement any assertion or claim that by the stumbling of the mule deceased was thrown from the car and under the wheels; or, if it may be said that such is the reasonable inference, there is still lacking any showing of any causal connection between such mishap and the condition of the door. If the record disclosed any other evidence tending in any degree to sustain the affirmative of the single issue submitted to the jury, it might well be that the testimony of Brown would have been of some value as tending to corroborate it; but standing alone, as it does, without corroboration or support, it is wholly insufficient to sustain the verdict. We come to this conclusion the more readily in view of the atmosphere of doubt which surrounds this particular item of evidence.

We concede that the credibility of the witness and the weight and value of his testimony are matters for the jury alone; but on a motion for a new trial, if an examination of the record discloses that the verdict is explainable only on the theory that the jury gave credence to testimony which is enveloped in grave doubt or uncertainty which no amount of judicial charity can ignore, it is within the authority of the court in the interest of substantial justice to sustain the motion.

4. **NEW TRIAL:**
grounds: odor
of untruthful-
ness in record.

“The function of the court with reference to evidence is not fully and completely discharged when it determines the admissibility of evidence offered. It may still look into the whole case to see whether the items of evidence together constitute any substantial proof of the fact sought to be estab-

lished." *Brooks v. Brotherhood of Am. Yeomen*, 115 Iowa 588.

It is true that this rule has special reference to the functions of the trial court; but it is an accepted proposition that this court will more readily interfere with the discretion of the trial court where a new trial is denied than where it is granted, and in a clear case where manifest injustice will be done by permitting a verdict to stand we do not hesitate to reverse a judgment entered thereon. *Cottage Organ Co. v. Caldwell*, 94 Iowa 584; *Turley v. Griffin*, 106 Iowa 161; *Snyder v. Thompson*, 134 Iowa 725. That the present case calls for an application of this rule, we have no doubt. So far as the record discloses, the witnesses Leach, Murphy, Brown and Ainer Peterson were the only persons having any opportunity to hear what the deceased said when he was discovered in his injured condition or while he was being removed from the mine. Of these, Leach, the first to arrive, testifies that, while still at the place of accident and before being placed in the car for removal, deceased said that his "light went out and the mule slowed up and squeezed him when his light went out," and that he hung on as long as he could. Murphy, the next to arrive, testifies that, in answer to his inquiry as to how it happened, deceased said, "I guess it got dark and in reaching for the butt-stick I fell." The witness further adds, "He said his lamp had went out." The significance, if true, of this evidence that deceased said his light went out and the mule slowed up and squeezed him, is shown by other evidence that it is characteristic of a mule employed in driving through dark mine entries that it will stop suddenly if the driver's light goes out; and it is manifest that if such stop is made unexpectedly, the driver, standing on the tail chain, is liable to be caught and squeezed between the moving car and the rump of the mule. Ainer Peterson, brother of the deceased, was last to arrive, and he says nothing of hearing the statements spoken of by Leach and Murphy. Of the three men getting into the car to take deceased to the shaft, Brown, the driver, alone testifies to the alleged statement about the mule's

hitting the door frame and afterwards stumbling down the hill. Murphy, who was assisting in supporting the man, denies that any such thing was said; and strangely enough, the brother, who held the injured man in his arms, is silent on the subject, and plaintiff's counsel do not interrogate him concerning it. Brown himself did not testify to it until recalled after the plaintiff had once rested, and it is shown that, at the coroner's inquest, he signed a statement of his testimony there given to the effect that deceased, when being taken from under the car, stated that his "carbide lamp was the cause of the accident," and that that was all he said in regard to how it happened. In this statement, no mention was made of the language which Brown now attributes to the deceased on the way to the shaft. Moreover, upon cross-examination upon the subject, his answers are uncertain and unsatisfactory, and the frequency with which he takes refuge behind the response "I don't remember" and "I didn't hear it" is not reassuring of his entire reliability.

Without further prolonging the opinion, we hold that the motion for new trial should have been sustained, and the judgment appealed from is therefore reversed, and cause remanded for a new trial in harmony with this opinion.—*Reversed and Remanded.*

EVANS, C. J., DEEMER and PRESTON, JJ., concur.

CITY OF OTTUMWA, Appellee, v. MCCARTHY IMPROVEMENT CO.
et al., Appellants.

APPEAL AND ERROR: Abstract—Preparation—Who Must Supply

- 1 **Omitted Evidence.** Appellant, in the preparation of his abstract, may include, and is presumed to include, the evidence which he deems material to the full consideration of all questions on appeal. Appellee cannot, even by a denial that appellant's abstract contains all the evidence, compel appellant to supply omitted evidence which he (appellee) deems material.

LADD AND PRESTON, JJ., dissent.

PRINCIPLE APPLIED: On appeal, a material question was whether the defendant had been notified of a defective pavement, as a condition precedent to his liability for the cost of reconstruction. On the trial, certain letters from plaintiff to defendant were introduced, which letters plaintiff claimed established such notice. Judgment was rendered against defendant. On appeal, defendant (appellant) did not abstract the contents of these letters. Plaintiff (appellee) specifically denied "that the abstract with these letters omitted contained all the evidence," *but did not supply the letters in an amended abstract.* *Held*, appellee, by his failure to supply the evidence, adopted appellant's theory that their contents were not material to the consideration of any question on appeal.

TELEGRAPHS AND TELEPHONES: Evidence—Presumption of
2 Delivery—When. No presumption of "delivery" arises from the naked fact that a telegram properly addressed and signed is found in the files of a telegraph company.

PRINCIPLE APPLIED: The court makes this observation: "There was no evidence of how or for what purpose the supposed telegram came into the company's possession, nor that the requisite fee was paid, nor that it was sent."

APPEAL AND ERROR: Evidence—Improper Reception—Failure to
3 Include in Abstract—Effect. It is futile to ask the court to declare that the improper reception of evidence was prejudicial, when appellant has not favored the court with a showing of the substance or contents of such evidence. So *held* in reference to the improper reception of a non-abstracted telegram.

MUNICIPAL CORPORATIONS: Paving—Notice to Reconstruct—
4 Subsequently Accruing Damages—Non-Necessity for Second Notice. Where a paving contractor was entitled to notice of the defective condition of paving as a condition precedent to liability for cost of reconstruction, *held*, one notice was all-sufficient, even though, subsequent to the giving of such notice, and after the city commenced reconstruction work, additional damage was done by an unusual storm.

MUNICIPAL CORPORATIONS: Paving, Etc.—Performance Bond—
5 Guarantee Bond—Distinction. The fundamental distinction between (1) a bond conditioned to *perform* the contract, as per specifications, and (2) a bond conditioned to *guarantee* the completed work for a given period, is that, under the former, liability under the bond is foreclosed by a good-faith conclusion and agreement that the work has been done "as per specifications;" while under the latter, liability attaches for mistakes, oversights and fraud in the original acceptance, and for hidden and future developing defects.

Appeal from Wapello District Court.—D. M. ANDERSON,
Judge.

TUESDAY, JANUARY 12, 1915.

REHEARING DENIED MONDAY, OCTOBER 4, 1915, SUPPLEMENTAL
OPINION. SECOND REHEARING DENIED THURSDAY,
APRIL 6, 1916.

ACTION by the city of Ottumwa, on the guaranty bond of a contractor to repair defects in a pavement during seven years after being laid, resulted in a judgment as prayed. The defendant appeals.—*Affirmed.*

Sharon & Higgins and *J. J. Smith*, for appellants.

Lloyd L. Duke, City Solicitor, and *Tisdale & Heindel*, for appellee.

LADD, J.—I. On August 26, 1904, the McCarthy Improvement Company entered into a contract with the city of Ottumwa to pave and curb Market Street therein from the northeast line of Third Street to the southwest line of Fifth Street, in compliance with instructions, proposals and specifications attached. In Section 29 of the latter:

“The contractor expressly guarantees to maintain the pavement in good order for a period of seven years, and binds himself, his heirs and assigns to make all repairs which may, from any imperfections in said work or materials, or from any crumbling or disintegration of the materials, become necessary in that time, and the said contractor shall, whenever notified by the city engineer or street committee that repairs are required, at once make such repairs at his own expense, and if they are not made within the proper time, the street committee shall have power to cause such repairs to be made, and have the costs of the same charged to said contractor, and deducted from any moneys due under the contract, or that may afterwards become due; or if in case there be no funds due

the said contractor, then suit shall be instituted against the principal and his sureties for the collection of the said cost of repairs.

“At the end of the seven years’ period, the city engineer and street committee must determine whether or not the street is in good order, and the principal and his sureties shall not be discharged from liability on their maintenance bond until the said city engineer or street committee shall certify in writing that said pavement is in good order, natural ordinary wear and tear excepted.

“If at any time during the seven-year period, the pavement or any part of it has deteriorated through neglect in construction or improper material, to such an extent as to require reconstruction, in the opinion of the city engineer and street committee, by the consent of the city council, then upon due notice, or within a period of three months from date of said notice, the contractor shall proceed to reconstruct the pavement, or such part as is deemed necessary as aforesaid.

“If the contractor fails to do so at the end of three months, the street committee may, with the consent of the city council, proceed to reconstruct the pavement, and the cost thereof shall be collected by suit from the said contractor or his sureties.

“There shall be nothing in the above guarantee clause that shall require the contractor to make repairs, or re-lay any pavement made necessary to repair or re-lay by the taking up and re-laying of the same by water, gas, steam or plumbing companies or street railroads, or through any improvements made by the city or by any private parties, of any nature, it being the intention that the contractor shall guarantee his work for the period mentioned, from deterioration caused by improper materials, or neglect in the construction of the same, the ordinary natural wear and tear to be excepted.

“The contractor shall, before beginning work upon the contract, execute to the city of Ottumwa a good and sufficient bond, with sureties approved by the mayor, for the faithful

performance of the requirements of the guarantee clause to the amount of 50 per cent. of the contract price, which bond shall be in addition to the bonds required by law and ordinances of the city of Ottumwa."

The contractor executed a bond for the faithful performance of the contract, and also a guaranty bond reciting the above conditions and assuring their performance "according to the full spirit and intent thereof and in all particulars," conditioned that—

"If, at any time during the seven-year period aforesaid, the pavement or any part thereof has deteriorated through neglect in construction or improper material to such extent as to require reconstruction, in the opinion of said city engineer and street committee, by the consent of the city council, then upon due notice, or within a period of three months from the time of said notice, the contractor shall proceed to reconstruct the pavement or such part as is deemed necessary as aforesaid.

"If the contractors fail to do so at the end of said three months, the street committee may, with the consent of the city council, proceed to reconstruct the pavement, and the cost thereof shall be collected by suit from the said contractor and surety on this bond."

The improvements were completed, and this action is on the guaranty bond, begun December 10, 1910, alleging that the improvement company did not keep the streets in repair as agreed, and, as it had failed so to do on notice, this was done by the city, at an expense of \$1,552.32. The petition alleged, in substance:

"(a) That the concrete was not of the uniform thickness of six inches, but varied from two inches to six inches; (b) that the sand used was not a clean, sharp sand and free from any appreciable admixture of dust, clay, loam, or vegetable mould, but was a quicksand, and was not suitable for use in such work; (c) that the quantity of cement called for was not used, to wit, one part cement out of seven parts, and that

the cement was not properly mixed; (d) that the work was not done in a good, workmanlike manner; and (e) that, in consequence of these failures to comply with the requirements of the contract and the guarantee bond, the work required repairs and reconstruction."

The answer was a general denial, and averred: (1) That the work was performed under the supervision of the city engineer; (2) that the plan for paving was defective; (3) that the pavement should not have been taken up for heating, gas and water pipes, and this should not have been allowed; (4) that the quality of cement (Natural American Hydraulic) required by the specifications was poor; (5) that repairs and reconstruction were not required because of poor material or workmanship; (6) that notice requiring repairs or reconstruction was not given; and (7) that the cost to the city for the work done by the city was unreasonable. Appellant contends that the evidence was not sufficient to carry any of these issues to the jury. A careful examination of the evidence has convinced us otherwise, and that the finding of the jury that repairs of the street were required in consequence of defendant's negligence or use of defective materials has such support in the evidence as to preclude interference.

II. The issue as to whether the contractor had been notified, as exacted in the contract, that the pavement required repairing, before this was done by the plaintiff, was not submitted to the jury. It is said that this was

1. APPEAL AND
ERROR: ab-
stract: prepar-
ation: who
must supply
omitted evi-
dence.

error. It appeared from a letter dated July 29, 1910, and signed by the city engineer, mayor, and chairman of the street committee, that he was advised of the condition of the street and the necessity of repairs, estimating the probable cost at \$413. To this, the contractor responded by suggesting "that the city put in the work, and if we find that the damage to the paving was caused by our negligence, we will reimburse the city for the repairs." This obviated any further notice

as to the conditions at that time. There had been a heavy rainfall on July 28, 1910, a day or two before defendant was notified; and thereafter, on August 19th, a day or two after repairing had been begun by the city, there was another heavy downpour, resulting in additional injury to the pavement. Appellant contends that the contractor had no notice of the last injury. Five letters concerning the condition of Market Street between Fourth and Fifth Streets, signed by the city engineer, mayor, and chairman of the street commission, sent to defendant, were introduced in evidence. These were not abstracted, and the plaintiff specifically denied that the abstract with these omitted contained all the evidence. In defendant's amendment to the abstract, the dates of three of the letters are shown to have been prior to the last rainfall; and of the other two, the date of one was about August 23, 1910, and of the other, October 7th following. Only one letter, dated July 29th, was abstracted, and we have no means of ascertaining the contents of the last two. The circumstance that they were not copied into the transcript, but merely referred to as exhibits, as is customary, furnished no excuse for their omission; and the majority of the court are of the opinion that the denial of appellee did not cast upon the appellants the burden of setting out the letters in an additional abstract. The appellee having asserted the omission of said letters from the appellant's abstract, it was incumbent upon it, if it deemed said letters material to any issue, to present the same by way of an amendment to the abstract. In other words, the function of a denial is to put in issue the correctness of specific portions of the abstract as printed, but material portions omitted must be supplied by amendment filed by the party complaining, the matter to be regulated by the taxation of costs. The writer and Preston, J., are of the opinion that the appellant should not be permitted to thus saddle the labor and expense of furnishing essential portions of a complete abstract on the appellee. They necessarily yield, however, to

the tyranny of numbers. It follows that the appellant cannot be required to supply omitted portions of the record, as suggested in *Fordyce v. Humphrey*, 152 Iowa 76. Appellee, by omitting to supply letters not abstracted, acquiesced in the conclusion of appellant that these were not essential to a complete understanding of the case, and it is to be assumed that they carried no notice to the defendants of the injury to the pavement occasioned by the second rainfall.

III. A telegram, addressed to defendant and dated the day after the last storm and signed by the city engineer and the chairman of the street committee, was introduced in

2. TELEGRAPHS
AND TELE-
PHONES: evi-
dence: pre-
sumption of
delivery: when.

evidence, over objection as "incompetent, immaterial and because there is no proof of the transmission of the telegram." The local manager of the telegraph company testified to finding such a telegram in the office

files. How it came there does not appear, nor was there any showing that compensation was paid the company for sending. When a telegram, properly addressed, is delivered to the company, with payment of the fee for transmission, or is shown to have been sent, delivery to the addressee is to be inferred. *Commonwealth v. Jeffries*, 7 Allen (Mass.), 548 (83 Am. D. 712); *Perry v. German American Bank*, 53 Neb. 89 (68 Am. St. 593); *Oregon Steamship Co. v. Otis*, 100 N. Y. 446 (53 Am. Rep. 221); *Eppinger v. Scott*, 112 Cal. 369 (53 Am. St. 220, 223); *Western Twine Co. v. Wright* (S. D.), 44 L. R. A. 438; 2 Chamberlayne on Ev., Sec. 1069. This rule is analogous to that prevailing with reference to the delivery of letters. The telegraph companies are carriers of intelligence, perform a public service, and are somewhat regulated by law. Sec. 2158 *et seq.*, Code. The great bulk of telegrams are promptly delivered to the sendees; and as this is the usual course, with rare exceptions, the presumption of delivery arises. As was said in *Commonwealth v. Jeffries*, *supra*:

"No rule of evidence is better settled or more clearly

founded in good sense and sound policy than that which authorizes presumptions or inferences of fact to be deduced from the proof of certain other facts, which, according to the common experience of mankind or the usual course of business, naturally or necessarily lead to the result or conclusion which is sought to be drawn from them. Such presumptions or inferences depend on their own natural force and efficacy in generating a belief or conviction in the mind as derived from those connections which are shown by experience, irrespective of any legal relation. The process of ascertaining one fact from the existence of another is essential to the investigation of truth, and prevails in courts of law, as well as in the ordinary affairs of life, especially in cases where there is a well known and established usage or course of business, and primary evidence of the existence of a fact is wanting or difficult to be obtained. On this ground, the ruling of the court as to the effect of the evidence in question was clearly right. It comes within the principle on which it is held that proof that letters were deposited in the post office, duly directed, is evidence tending to show that they reached their destination and were received by the persons to whom they were addressed."

In *Perry v. German American Bank*, *supra*:

"Such presumption results naturally, if not necessarily, from the relation of telegraph companies to the public, which, in this state at least, is held to be that of public carriers of intelligence, with rights and duties analogous to those of carriers of goods and passengers."

In *Oregon Steamship Co. v. Otis*, *supra*:

"There is thus impressed upon the telegraph service something of a public character, and thrown around it the guard and the obligations of the public law, and it seems to us reasonable to assimilate the rules of evidence founded upon transmission by mail to that of transmission by telegraph. It may be that the presumption of correct delivery, agreeing in kind with that raised upon delivery to the post office, should

be deemed weaker in degree; but in view of the wide extension of telegraph facilities, and of their increasing use in business correspondence, and the difficulty of tracing a dispatch to its destination, we think it should be held that, upon proof of delivery of the message for the purpose of transmission, properly addressed to the correspondent at his place of residence, or where he has shown to have been, a presumption of fact arises that the telegram reached its destination, sufficient at least to put the other party to his denial and raise an issue to be determined."

As said, the delivery to the telegraph company for transmission, with the fee required therefor, or the sending of the message, raises the presumption that the telegram was delivered,

3. APPEAL AND
ERROR: evidence: improper reception: failure to include in abstract: effect.

the strength of such presumption depending on the circumstances of each particular case. But in this case, there was no evidence of how or for what purpose the supposed telegram came into the company's possession, nor that the requisite fee was paid, nor that the telegram was sent, and therefore no basis for the inference of delivery. In *Oregon Steamship Co. v. Otis, supra*, and *Eppinger v. Scott, supra*, evidence that the telegram was sent was held sufficient, without specific proof that it was delivered for transmission or the fee paid, on the theory that these facts were to be implied from the sending; but here, the record is without proof of the sending. It follows that the court erred in not sustaining the objection to this telegram. The ruling, however, cannot be said to have been prejudicial; for the telegram as introduced was not set out in the abstract. Whether the purported copy of a telegram in plaintiff's notice to produce is of that introduced in evidence does not appear. The inference of prejudice cannot be drawn, in the absence of a showing of the contents of the telegram excluded.

IV. The defendant, then, was not notified of the injury to the pavement consequent on the second rainfall. The jury,

however, was told in substance that the notice such as required by the contract was given. This was on the

4. MUNICIPAL CORPORATIONS: paving: notice to reconstruct: subsequently accruing damages: non-necessity for second notice.

theory that any defect in the pavement occasioned by the rain of August 19th and repair thereof was incident to the repair then going on. The evidence disclosed that the contractor had started to make the repairs two days before, and had practically all the brick removed from the street and piled on the side, but had not removed any of the foundation. The rain was unusual. The contractor continued the work and repaired the pavement, including any injury occasioned by the second storm, and the record shows that this was necessary in doing the work, as suggested by the defendant's letter, heretofore quoted. The defects appearing after the second rainfall were merely a continuation of those existing before; and though it then appeared that the expense of repairing would largely exceed the estimate when defendant was first notified, it was essential, in order to make the repairs contemplated. This being so, there was no necessity, under the contract and the correspondence of the parties, for any further notice, and the court was not in error in withdrawing the issue as to notice from the jury.

V. The contractor executed two bonds, one for the faithful performance of the contract to make the improvement according to the plans and specifications, and the other assuring the guaranty of the improvement for a period of seven years. The improvements were to be made under the supervision and to the satisfaction of the city engineer and the street committee. This was done, and the

5. MUNICIPAL CORPORATIONS: paving, etc.: performance bond: guarantee bond: distinction.

improvements accepted by the city council. This was in compliance with the conditions of the first bond, and thereafter, the city, in the absence of fraud, might not, in an action thereon, question performance in conformity with the plans and specifications. Such is the purport of authorities cited

by the appellant, and too numerous for citation. Such approval by its officers is held, in a suit on a bond like the first, in the absence of fraud, to estop the city from asserting otherwise. But the parties in the contract undertook that an additional test should be applied to the work performed and material furnished—that of use and time. The manifest object of this was to obviate any mistake or oversight through negligence or dereliction on the part of representatives of the city, and further assure it of the quality of workmanship and material stipulated. In pavement making, as is well known, it is difficult for the most skillful and experienced expert to discover all defects in material, foundation and other parts of the work as it progresses, and such defects are often slow of development. For this reason, in the advertisement for bids and in the contract, this guaranty bond was exacted. It was authorized by Section 814 of the Code Supplement, 1902, and has been held not to cast on the abutting owner the expenses of ordinary repairs in future, but is merely a guaranty of quality and durability of the improvement. *Osburn v. City of Lyons*, 104 Iowa 160; *Allen v. City of Davenport*, 107 Iowa 90; *Diver v. Keokuk Savings Bank*, 126 Iowa 691. The contractor is merely required to guarantee, in addition to his undertaking to perform according to plans and specifications and to the satisfaction of the officers of the city, that he will make good any defects arising from bad materials or the improper performance of the work during the stipulated period, and the bond is the security for compliance therewith. It is a substitute, as it were, for a condition under which a percentage of the price might be retained by the municipality for the purpose of repairing any defects in the pavement and curbing that might reveal themselves during this lapse of time, and is exacted, not as appellant contends, as a sort of moral inducement or impetus to the contractor to abide by his contract and avoid a breach of the bond to perform in accordance therewith, but to cover future contingencies subsequent to acceptance by the city, and to protect it against those defects

which may have been overlooked or have subsequently developed, regardless of whether they were known to the representatives of the city or not. Indeed, its purpose is to obviate the miscarriages incident to such improvements, and insure to the city and the abutting owners that for which they have paid, and to exact this from the contractor is no more than insisting on *quid pro quo*. No hardship is involved, for defendant was fully advised by the advertisement for bids what would be exacted, and voluntarily executed the contract and bond guaranteeing its work "from deterioration caused by improper materials or neglect in the construction of the same, the ordinary wear and tear" excepted, during a period of seven years; and as against this test of time and use, the action of the city officials in approving the work and accepting it when done furnishes no defense. The evidence was such as to put in issue whether the condition of the pavement was consequent upon defendant's negligence and defective material, and the instructions were in harmony with the law as herein stated. The judgment is—*Affirmed*.

All the justices concur, save as appears above.

GEORGE HUNTER, Appellee, v. COLFAX CONSOLIDATED COAL COMPANY, Appellant.

MASTER AND SERVANT: Workmen's Compensation Act—Non-1, 25 Negligence of Employer. The Workmen's Compensation Act (Secs. 2477-m to 2477-m51, Code Supp., 1913,) does not impose *absolute* liability on an employer who elects to reject the provisions of the act—does not deprive such employer of the right to plead and submit to a jury the defense that he was *wholly blameless* for an injury to an employee.

Note: The above is true even in light of the fact that an employer who elects to reject the act is placed under the following handicaps, viz:

1. Denied the right to plead assumption of risk (a) inherent in the employment, or (b) incident to failure to furnish a safe place to work, safe tools, etc.

2. Denied the right to plead the exercise of reasonable care in selecting competent employees.

3. Denied the right to plead the negligence of a co-employee.

4. Denied the former benefits of contributory negligence, except in so far as such negligence reveals (a) willfully self-inflicted injuries and (b) injuries caused by intoxication; and

5. Presumed to have been proximately negligent in the event of an injury to the employee in the course of his employment, with resulting burden of proof on him (the employer) *to show to the contrary*.

NEGLIGENCE: Contributory Negligence—Workmen's Compensation

2 **Act—Willfully Self-Inflicted Injuries—Drunkenness.** Contributory negligence is a defense still preserved to an employer who elects to reject the provisions of the Workmen's Compensation Act, in so far only as such negligence shows (a) willfully self-inflicted injuries, and (b) injuries caused by the employee's intoxication.

STATUTES: Construction—Radical Innovations—Judicial Legislation.

3 Radical departures from long-established rules of law will not be *construed* into existence. They must be *created* by plain words, not of the judiciary but of the legislature. So *held* under the claim that the Workmen's Compensation Act deprived an employer who elected to reject the act of the right to establish that he was wholly blameless for an act.

STATUTES: Construction—Strained Applications of Terms.

4 Provisions of a connected statute, manifestly intended to be comprehensively complete in itself, cannot, by judicial construction alone, be bodily lifted out of the statute and held to apply solely to another statute enacted prior to the one in question. So *held* with reference to the claim that the provision of the Workmen's Compensation Act (enacted in 1913) which creates a *presumption* of proximate negligence against the employer and places on him the burden of proof to show the contrary was intended to have application, not to the act in which it was found, but solely to the Mining Act (enacted in 1911).

STATUTES: Construction—Contradictory Construction.

5 A provision of a statute cannot be held to have some application and at the same time to be surplusage only.

MASTER AND SERVANT: Workmen's Compensation Act—Inherent

6 **Risk of Employment—Scope of Doctrine.** The risks which "arise out of, inhere in, or are incidental to, an employment," have never been so generally held by the courts to include those risks only which occur *without fault of the master* as to justify the court in holding that the Workmen's Compensation Act, in taking from

a non-accepting employer the right to plead the assumption of such risk by the employee, intended to deprive the employer of the right to plead that he was wholly blameless, especially when Sec. 2477-m of the act provides a way by which the employer may show that he was not negligent—was blameless.

CONSTITUTIONAL LAW: Construction, Etc.—Constructions Leading to Invalidity—Avoidance. The desire of the court is to shield, if possible, every statute from every charge of unconstitutionality. Between two possible constructions, the court will hold to that which preserves, rather than to that which destroys.

PRINCIPLE APPLIED: In the construction of the Workmen's Compensation Act, the court had under consideration that part of Sec. 2477-m which abolished the right of the employer to plead "assumption of risk inhering in an employment," when construed in connection with that further part of the same section providing that it shall be presumed, in case of injury to an employee, that the employer was proximately negligent, and must assume the burden to show to the contrary. Two constructions were possible: first, that said provisions imposed on the employer an *absolute* liability, even though he was blameless; and, second, that the employer was privileged to show that he was wholly blameless for the injury. The first would render the act of doubtful constitutionality. The second would clearly preserve the act from constitutional objections. *Held*, the latter holding must prevail.

CONSTITUTIONAL LAW: Construction, Etc.—"Eighteenth Century Constitution"—"Twentieth Century Conditions." The question is not what the Constitution *ought* to authorize, in the opinion of the court, but what *does* it authorize. "The Constitution is not a public enemy whom judges are charged to disarm whenever possible."

APPEAL AND ERROR: Assignments of Error—Assignments Foreign to Object of Appeal. When the sole purpose of an appeal is to secure a ruling on the constitutionality of the statute in question, assignments of error based on points wholly foreign to the confessed objects of the appeal will be disregarded.

CONSTITUTIONAL LAW: Construction, Etc.—Borrowed Objection. 10, 15 A statute will not be declared unconstitutional on a borrowed objection—a grievance which can occur only to one not complaining.

CONSTITUTIONAL LAW: Construction, Etc.—Theorized Condition 11 —**Impairment of Contract.** Inasmuch as the Workmen's Compensation Act expressly exempts from its operation the conditions existing at the time of the passage of the act, and inasmuch as the case at bar concededly arose after said act took effect, the court

declines to pass upon the question whether said act *might*, upon some theorized condition, have the effect of impairing the obligation of contracts.

CONSTITUTIONAL LAW: Right to Contract—Invalidating Con-
12 tracts—Workmen's Compensation Act. The constitutional "right to contract" is limited by the legislative right to invalidate all contracts, rules, regulations or devices:

- (a) Which tend to reduce liability for negligence, or
- (b) Which stimulate a disregard of human safety, or
- (c) Which encourage breaches of contract or statutory obligations entered into, or
- (d) Which, generally, interfere with declared public policy.

Held, the following provisions of the Workmen's Compensation Act do not work an unconstitutional interference with the right to contract:

- (a) Prohibiting, generally, any device by which the employer might escape the obligations imposed;
- (b) Prohibiting the withholding of wages;
- (c) Prohibiting the exaction of contributions or insurance premiums;
- (d) Prohibiting the waiver of rights by employees;
- (e) Prohibiting efforts by an employer to induce employees to reject the act; and
- (f) Prohibiting, in effect, contracts of settlement within 12 days of an injury. (Secs. 2477-m2, m7, m12, m17, m18.)

CONSTITUTIONAL LAW: Police Power—Right to Contract—Lim-
13 itations—Workmen's Compensation Act. The Workmen's Compensation Act leaves both employer and employee the liberty to accept or reject its provisions, and the requirements of the act, in case of acceptance, constitute a proper exercise by the legislature of the general power of "community self-defense,"—the police power,—a power which embraces even the right to abridge, for purposes properly within its scope, the right of contract.

CONSTITUTIONAL LAW: Equal Protection of Laws—Classifica-
14 tions—Workmen's Compensation Act. The primary duty of the legislature to classify—to say who shall and who shall not come under the provisions of an enactment—will not be interfered with by the court unless the classification is so *palpably* arbitrary that there can be no room for doubt that discretion has been abused. *Held*, the exclusion from the Workmen's Compensation Act of household or domestic servants, laborers engaged in farm or other agricultural pursuits, and those whose employment is of a casual nature, is a classification supported by authority and reason, and will not be interfered with by the court.

CONSTITUTIONAL LAW: Construction, Etc.—Borrowed Objection.
10, 15

CONSTITUTIONAL LAW: Equal Protection of Laws—Classifica-
16 **tions—Optional Application—Effect.** A statutory classification—
a declaration that certain employees are and certain others are not
within the provisions of the act—cannot be held to be arbitrary
when those included may voluntarily exclude themselves, and those
excluded may, in effect, voluntarily include themselves. So held
under the Workmen's Compensation Act.

MASTER AND SERVANT: Workmen's Compensation Act—Rejec-
17 **tion by Employee—Effect.** An employee who elects to reject the
provisions of the Workmen's Compensation Act is penalized in
that he arms the employer with the right to plead any and all
defenses which he had the right to plead prior to the passage of
said act. So held by construing Secs. 2477-m, m2, m9, as related
sections.

CONSTITUTIONAL LAW: Equal Protection of Laws—Workmen's
18 **Compensation Act—Consequences Attending Acceptance and Re-**
jection. The difference in consequences attaching, respectively,
to rejection and acceptance of the provisions of the Workmen's
Compensation Act by employer and employee is not so manifestly
and palpably arbitrary and such misuse of the conceded power of
the legislature to classify as to justify a holding that the said act
is unconstitutional by reason thereof, some fair differences being
allowable under the police power, in order to equalize the inequality
of positions held by employer and employee.

CONSTITUTIONAL LAW: Due Process—Workmen's Compensation
19 **Act—Compelling Insurance.** That feature of the Workmen's
Compensation Act (Sec. 2477-m41, *et seq.*, Code Supp., 1913,) which
requires an employer to insure his liability is not violative of the
"due process" clause of our Constitutions, on the theory that the
maintenance of such insurance exacts a *tax* for a purely private
purpose.

TAXATION: Purpose of Tax—Workmen's Compensation Act—Com-
20 **pulsory Insurance—Police Power.** The compulsory scheme of in-
surance provided by the Workmen's Compensation Act, to secure
workmen injured in hazardous employments and their dependents
from becoming objects of charity, tends to the accomplishment of
an object well within the "police power" of the state, and the
cost, on the employer, of maintaining such scheme of insurance, if
conceded to be a *tax*, is a tax for a *public purpose*, even though
not wholly so.

CONSTITUTIONAL LAW: Distribution of Powers—Delegation of
21 **Judicial Power—Workmen's Compensation Act.** Whether the

procedure provided by the Workmen's Compensation Act for hearing on a claim for compensation, including the appointment of a board of arbitrators, the hearing held and findings made by the board, and the power in the Industrial Commissioner to modify such determinations, is a delegation of *judicial* power, *quære*. (Secs. 2477-m24 to 2477-m34, Code Supp., 1913.)

CONSTITUTIONAL LAW: Distribution of Powers—Workmen's
22 Compensation Act—Judicial Power of Commissioner and Arbitrators. No *unwarranted* delegation of judicial power is provided in that part of the Workmen's Compensation Act which provides: (a) for filing with the commissioner memorandums of agreements as to compensation; (b) for the approval or disapproval of the same by the commissioner; (c) for the formation of an arbitration board where no agreement as to compensation is reached; (d) for hearings and findings by the said board; (e) for the modification of such findings by the commissioner; (f) for a limited appeal to the courts; and (g) for an entry of a decree by the court on said final findings. (Secs. 2477-m24 to 2477-m34, Code Supp., 1913.)

CONSTITUTIONAL LAW: Distribution of Powers—Total Ouster
23 of Courts—Workmen's Compensation Act. The provisions of the Workmen's Compensation Act providing for the application of the statutory compensation schedules through the agency of a board of arbitrators *do not work a total ouster of the jurisdiction of the court*—do not prevent the courts, in a proper case, from assuming in addition to the powers granted by the act, jurisdiction to determine: (a) whether the act was being enforced against one who had, under its terms, rejected it; (b) whether the claimant was an employee; (c) whether the claimant was even injured; (d) whether the injury was one arising out of the employment; (e) whether the injury was due to the intoxication of the servant or was self-inflicted; (f) whether an award different from the statute schedules had been made; (g) whether fraud had entered into the award; and (h) whether the arbitrators had attempted judicial functions in violation of or not granted by the act.

CONSTITUTIONAL LAW: Distribution of Powers—Judicial Powers
24 —Right of Legislature to Delegate. The legislature has constitutional right both to delegate judicial powers to bodies other than duly constituted judicial tribunals and power to authorize by statute the making of contracts delegating such powers.

MASTER AND SERVANT: Workmen's Compensation Act—Non-
1, 25 Negligence of Employer.

MASTER AND SERVANT: Burden of Proof—Statutory Changes—
26 Constitutionality. The Constitution was not formerly violated in

any of its provisions by the court-made rule that an employee must show that the employer was to blame for his injury: neither is the Constitution now violated by the provisions of the Workmen's Compensation Act that the employer must show that he was wholly blameless.

MASTER AND SERVANT: Workmen's Compensation Act—Abolition of Defenses—Constitutional Law. Depriving an employer who alone rejects the provisions of the Workmen's Compensation Act of the defenses of contributory negligence, assumption of risk, and negligence of co-servants, violates no constitutional right of the employer, the reasons for such holding being placed, generally, on the thought (a) that such deprivation does not constitute an arbitrary classification, and (b) that such former defenses were only "court-made" rules and must yield to statutory policy.

CONSTITUTIONAL LAW: Jury Trial—Denial of Right—Workmen's Compensation Act. An employer who rejects the provisions of the Workmen's Compensation Act may not say that he is, in reality, denied a jury trial in a personal injury controversy with his employee because said act (a) withdraws from him the right to plead the former common-law personal injury defenses, and (b) relieves the employee of burdens of proof and imposes them on the employer.

JURY: Jury Trial—Denial—Workmen's Compensation Act—Constitutional Law. An acceptance by an employer of the provisions of the Workmen's Compensation Act (said act providing a proceeding to administer the act without a jury) works an effectual waiver of the employer's right to a jury trial.

JURY: Right to Jury—Scope of Right. The right to jury trial is not absolute in the sense that it has universal application. The right exists only in cases where it existed at the adoption of the Constitution. So held under the Workmen's Compensation Act.

JURY: Right to Jury—Federal Constitution. The Federal Constitution does not attempt to regulate the granting or denying of jury trial by the state.

CONSTITUTIONAL LAW: Due Process—Workmen's Compensation Act. No denial of "due process of law" or "equal protection of law," or "abridgement of the privileges and immunities of citizenship" is occasioned by the Workmen's Compensation Act which provides, *inter alia*, a procedure, through boards of arbitration, the industrial commissioner, etc., for the administration of the act; such phrase, "due process," as employed in the Constitution, not necessarily implying a regular procedure in a court of justice.

CONSTITUTIONAL LAW: Privileges and Immunities—Corporations. A corporation is not a "citizen" within the protection of the "privileges and immunities" provisions of the Federal Constitution.

MASTER AND SERVANT: Workmen's Compensation Act—Common Law Defenses—Abrogation—Constitutional Law. Depriving the employer of the former common-law personal injury defenses, and relieving the employee of burdens of proof and transferring them to the employer as a penalty for his non-acceptance of the provisions of the Workmen's Compensation Act, do not constitute unreasonable coercion to induce acceptance of the act by the employer, the argument being, (a) that the legislature has undoubted constitutional right to arbitrarily withdraw any or all such defenses, or to change rules of evidence, and (b) that what the legislature may arbitrarily declare, it may conditionally declare—may declare as a penalty for non-acceptance of the act in question.

MASTER AND SERVANT: Workmen's Compensation Act—Non-Accepting Employer—Contributory Negligence as Mitigating Damages. An employer who may elect to reject the provisions of the Workmen's Compensation Act may plead contributory negligence of the employee in mitigation of damages. (Sec. 3593-a, Code Suppl. Supp., 1915.)

Appeal from Jasper District Court.—JOHN F. TALBOTT, Judge.

WEDNESDAY, NOVEMBER 24, 1915.

REHEARING DENIED THURSDAY, APRIL 6, 1916.

THE defendant corporation, one that might be subject to the provisions of Chapter 147 of the Acts of the Thirty-fifth General Assembly, popularly known as the Workmen's Compensation Act, has elected to reject the provisions of it.

Plaintiff was in the employ of defendant as a miner, and injured by a fall of coal while in that employment. It is stipulated that, if he be entitled to recover at all, it may be in the sum of \$100, with interest at six per cent. from July 24, 1914. Judgment in that sum was entered against defendant, and it appeals.—*Affirmed* in part. *Reversed* in part.

R. & F. Ryan, for appellant.

John T. Clarkson, for appellee.

Stipp, Perry & Starzinger and Mabry & Hickenlooper, amici curiae.

SALINGER, J.—One defense interposed was that the injury suffered by plaintiff was wholly due to his own negligence. Upon the issue created by this defense, defendant requested, and was denied, trial by jury; because it was

1. MASTER AND
SERVANT: WORK-
MEN'S COMPEN-
SATION ACT:
NON-NEGLECTANCE
OF EMPLOYER.

the judgment of the trial court that such defense was precluded by the provisions of said act.

Appellant insists that the act is violative of the Constitution of the United States and of the state, because its provisions deny him the right to make said defense, and to have it tried by jury. If the act does not take these rights from defendant, the claim that taking them is a violation of the fundamental law is disposed of. A statute is not unconstitutional because a court misunderstands it.

Does the act deprive the employer who elects to reject the act of the right of submitting to a jury the defense that it was wholly guiltless? While, as will presently be seen, appellee overlooks the effect of the concession made by him, he does and should concede that, before the act, the master had the right to make this defense, and still has, unless the act has taken it from him. We must, then, turn to the act itself. It provides that the employer may hereafter not avail himself of either or all of the following matters:

1. That the employee "assumed the risks inherent in, or incident to, or arising out of his or her employment."

2. Assumed "the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work."

3. Assumed the risks "arising from the failure of the employer to furnish reasonably safe tools and appliances."

4. That the employer "exercised reasonable care in selecting reasonably competent employees in the business."

5. "That the injury was caused by the negligence of a co-employee."

Of the defenses so taken away, two, those we have numbered 2 and 3, involve the confession of specified acts of negligence on part of the employer, and an avoiding them with claim that the employe has so conducted himself as that he may not complain of injuries arising from such acts of negligence. Manifestly, these provisions but take away a shield against negligence committed by the employer. No law which merely denies the right to excuse a specified negligent act which has been committed can have any bearing on whether it be a defense that no negligent act has been done.

Eliminating the defense that the master used reasonable care to insure competent fellows for the servant is no provision the master shall pay though wholly without fault. It merely provides that proper care in one named respect alone shall not be a defense.

Taking away the defense that the injury was caused by the negligence of a co-employe does just what it does. It provides merely that the employer may not be excused because one of his servants negligently injured another—a provision which leaves entirely open whether there remains the defense that the injury is due neither to the fault of the fellow servant nor to a fault of the employer.

The provision that wilful negligence of the employe, with intent to cause his own injury, or negligence on his part due to his intoxication, remain defenses, deals with cases where

both master and servant are or may be in varying degrees to blame, and limits the defense that the master is not liable because the servant contributed to his own injury, to contribution by wilful self-infliction or by negligence due to drunkenness. But that two specified acts of negligence on part of the plaintiff remain a defense does not establish that the employer may not show that, whoever else was to blame, or contributed, or whatever

2. NEGLIGENCE:
contributory
negligence:
workmen's
compensation
act: wilfully
self-inflicted
injuries:
drunkenness.

the mental attitude or condition of the contributor, he (the defendant) was in no manner to blame. Such a provision settles how far the negligence of the employe remains available as a defense, but does not touch the question whether the freedom of the employer from all blame remains a defense.

Nothing thus far adverted to has attempted to make the employer pay damages for injuries suffered in and because of employment given by him, where he is in no manner blameable for such injury. If the act itself has created such absolute liability, it must be done, so far as anything like doing it in terms is concerned, by that part of it which is:

"It shall be presumed [A] that the injury to the employe was the direct result and growing out of the negligence of the employer; [B] and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence." Sec. 2477-m (Par. 4), Code Supp., 1913.

This is not a provision the employer has not the right to show that he was wholly free from blame, but that he must take the affirmative upon the claim that he is blameless; that the employe need not prove that the employer was at fault, but the latter must show he was not. That no more than this was intended is, we think, clear, because:

1. Without reference to whether the legislature has power to say that the employer shall pay for an injury for which he is in no manner at fault, such a provision is so radical a departure from what was the law before the enactment of this statute as that such liability should not be construed into existence, but be created by plain words of the legislature.

3. STATUTES: CONSTRUCTION: radical innovations: judicial legislation.

2. A consideration of other provisions *in pari materia* strongly indicates that there was no purpose to create absolute liability. For instance, Section 7 is that, if the injury is caused by a stranger and the master is made to pay compensation, he may recover over of the stranger whose fault is responsible for the injury.

3. Nothing but an utterly strained construction of the words of the statute can reach the conclusion that it eliminates the defense that the employer is in no way in fault.

4. It is not a natural construction that a statute has carefully defined how that shall be proven which it declares is no longer a defense; that it prescribes *how* a defense shall be established and, also, that such defense shall not be asserted; that a presumption of fact which the statute says may be rebutted establishes a liability, incontestably.

II. We found it very difficult to get a clear understanding of why appellee contends that, notwithstanding the provision that the master may escape liability if he prove the injury due to no fault of his, the statute should be construed to mean that such want of fault is no defense. We conclude that the following are some of the arguments for such contention:

1. The words which declare presumption as to, and the burden of proof on, the absence of negligence on part of the employer, are addressed to cases that may arise under Section 41, Chapter 106, Acts of the Thirty-fourth General Assembly. This chapter deals with the duty of a miner to properly support the roof of his work chamber and the counter-duty of the employer, and has provision as to visitation of the place of work, and giving proper instructions.

The Compensation Act deals with many employers and employes other than those connected with mining; and the provisions of its Section 4 are limited to cases in which the employer rejects the Compensation Act of which Section 4 is a part.

Said Chapter 106, Acts of the Thirty-fourth General Assembly, is not a workmen's compensation act, and has no reference to the subject of compensation. Section 41 thereof is, in the rough, a regulation confined to the narrow subject of the duties of the mine foreman or pit boss. And neither Section 41 nor all of the chapter depend on the rejection

4. STATUTES: construction: strained applications of terms.

tion of any law by the employer. It is unbelievable that the unmistakable general language found in Section 4 of the Workmen's Compensation Act—that in cases where the employer has elected to reject the provisions of an act which deals with actions between various employers and employes for personal injuries, there shall arise a presumption the master was at fault, and the burden be upon him to rebut the presumption—was intended to apply only to said statute of an earlier general assembly, to which, as seen, it can have no logical relation, and not to apply to the very act in which it is found and which, as seen, gives full scope for the operation of the section.

2. It is next urged that this provision on presumption and burden of proof refers to that part of Section 1 of the act which eliminates as a defense assuming the risk of the failure of the employer to provide and maintain a reasonably safe place to work, the risk of his failure to furnish reasonably safe tools or appliances, and the risk of his failure to select reasonably competent fellow employes.

5. STATUTES: construction: contradictory construction.

Each of these defenses is eliminated by the act. As will presently be seen, the appellee also argues that the provision as to presumption and burden of proof is mere surplusage, because the act eliminates assumption of risks which are inherent in, incidental to or arising out of the employment. Manifestly, both positions cannot be sound. If taking away the defense of assuming the risks inherent to the employment makes mere surplusage of provisions as to presumptions of negligence against the master and his burden of proving freedom from negligence, then these provisions cannot be accounted for with the claim that they are not idle because they may operate on defenses such as assuming the risk of negligent fellow servants. If the elimination of one assumption of risk makes the provisions of Section 4 waste words, then the taking away of another assumption of risk cannot

give life to and account for the presence of Section 4. It is impossible in logic that words in a statute have nothing to operate upon because one defense of assumed risk is eliminated from the statute in which the words are found, and that at the same time construing these words to be useless may be avoided with the claim that they apply to other defenses of assumed risk, which the same statute has also eliminated.

3. It is insisted that, by eliminating the defense that the employe had "assumed the risks inherent in or incidental to or arising out of" the employment, the act made idle its said other provisions as to presumptions and

6. MASTER AND
SERVANT: WORK-
men's compen-
sation act: in-
herent risk of
employment:
scope of doc-
trine.

burden of proof. This is without meaning unless intended to assert that the two are in such sense equivalents that, when the legislature took away the assumption of risks inherent in, arising out of, or incidental to

the employment, it must have intended to eliminate the defense that the injury was in no degree due to act or omission of the employer. Or, as appellee puts it, when this defense was eliminated, "it was equivalent to saying that the employer shall not escape liability, regardless of fault." (Brief, 58.) In other words, the only risks which arise out of, inhere in, or are incidental to, the employments regulated by the act are risks of injuries that occur without fault of the employer; therefore, the legislature took away the defense of being wholly without fault. Wherefore, in turn, it is manifest that, no matter how absurd it may seem, the legislature took the trouble to make provisions which make rules about proving a thing which the same act took out of existence.

If the elimination by Section 1 of three specified assumptions of risk which arise from default of the employer is to mean that the legislature thus exhausted the entire field of assuming the negligence of the employer, and that, consequently, the further provision of the section which takes away

the defense of assuming risks "inherent in or incidental to or arising out of" the employment has nothing to operate upon other than assumption of what occurs without the fault of the employer, then it is difficult to understand why Division B of Section 3 should proceed on the theory that Section 1 has not eliminated all assuming of the fault of the employer, in that Section 3 provides consequences for a fault on his part not mentioned in Section 1, and speaks of this additional negligence of the master as another "assumed risk," eliminated as a defense.

This contention presupposes, too, what is contrary to common knowledge, that injuries arising from causes not inherent in, or incidental to the employment, and not due to the fault of the employer, do occur.

B.

Again, such argument presupposes that, whenever an employe has been denied recovery on the ground that his injuries arose from assuming such inherent risks, it was so universally a mere holding that the master was no contributor to the injury as that the legislature must have understood, when it took away the defense that there was such assumption, that it was eliminating the defense that the master had in no degree contributed.

It is true it has been held the servant may not recover where his injury is due to inherent risks assumed by him, because allowing such recovery would compel the master to pay for injuries for which he was not to blame. In *Ives v. South Buffalo R. Co.* (N. Y.), 94 N. E., at 433, right column, the New York Compensation Act is held to be invalid because the abolition of the defense of assumed inherent risks operates to dispense with proof that the master was negligent. This reasoning is sustained in 3 Labatt (2d Ed.), Sec. 1186a, p. 3188; 5 Labatt, Sec. 1647, p. 5047; and in Webb's Pollock on Torts (Enlarged American Edition), page 196. But it is not sufficient that this is the holding of some authorities, nor

sufficient for the purposes of the present point if, as they do not, the greater number of authorities so held. To make out a case for the proposition that the legislature could have intended nothing but taking away the defense that the master was wholly free from fault when it eliminated the defense of inherent risks assumed, it must be made to appear that it was so universally understood that precluding a recovery for injuries due to such inherent risks was a method of shielding the employer from paying for injuries due to no fault of his, as that the legislature must have intended, by taking away the defense of assumption, to also take away the alleged basic defense which it is claimed the defense of assuming inherent risks effectuated. Measured by this standard, we find ourselves under no compulsion to attribute such intent to the framers of this act.

Here, as elsewhere, many texts and decisions are cited by way of illustration and argument—to point out, for instance, what the holdings on a subject are in other jurisdictions, to show that in those jurisdictions a position more drastic than the one we take is sustained. Unless it is said here, in terms, that references to such are an approval or adoption of them for this jurisdiction, our reference to or analysis of them must not be construed to mean that these shall be held to rule similar controversies when presented here.

The great preponderance does not place the defense upon the footing of a plea that the master should not pay for what he is not to blame for.

It is held in *Bria v. Westinghouse*, 117 N. Y. S. 195, that “the very doctrine of assumption of risk by a servant has reference to risks which exist by the negligence of the master, i. e., by his failure to use reasonable care.” *Schmitt v. Hamilton Mfg. Co.*, 115 N. W. 353; *Zentner v. Oshkosh Gaslight Co.*, 112 N. W. 449; *Corrigan v. West Div. S. S. Co.* (Wis.), 113 N. W. 441; and *Walaszewski v. Schoknecht*, 106 N. W. 1070, all decided by the Supreme Court of Wisconsin, all

involve a concession that the defense of assumption of risk inherent in a calling may be invoked in cases where the master was guilty of some negligence. And it is said in 3 Labatt (2d Ed.), Sec. 1186a, pp. 3189, 3190, that:

“It should be noted also that statutes which in terms abolish the doctrine of assumption of risk as a defense go no further than to abolish the defense where the servant is injured by reason of the master’s negligence, and do not abolish assumption of risk where the master has not been negligent.”

In *Holmes v. Mather*, L. R., 10 Ex., at page 267, it is suggested that the defense rests both upon the absence of fault on part of the one whose act causes an injury, and the inability to recover for that which arises from taking ordinary risks. And other cases found themselves upon a dual basis, i. e., want of fault on part of the master, and denial of the right to recover for what flows from taking the ordinary and inherent risks of a calling. See *Jenkins v. Phoenix Const. Co.*, 129 N. Y. S. 937; *Southern R. Co. v. Foster* (Va.), 69 S. E. 972. While the *Ives* case, *supra*, holds that the elimination *in toto* of this defense condemns the New York act because it makes the master pay when he is not in fault, it clearly indicates that there exists an assumption of risks due to the master’s negligence, which the legislature may abolish as a defense, there being in fact a New York statute which does entirely abolish such defense. In *Martin v. Des Moines Ed. L. Co.*, 131 Iowa, at page 735, we say, *arguendo*, while speaking to the question of pleading with reference to burden of proof, and as to what must be affirmatively pleaded, that the expression “risks naturally incident to or inherent in the employment” excludes the idea of negligence. But in the same case, at page 736, we do recognize that, where one remains in service after he knows, or ought to know, his dangers, and does so without promise of remedy, this, also, constitutes an “assumption”—that of assuming the master’s negligence—which bars recovery.

In Webb's Pollock on Torts (Enlarged American Edition), page 195, it is said it does not follow that a man is negligent or imprudent because he chooses to encounter a risk which he knows and appreciates, but if he does voluntarily run the risk, he cannot complain afterwards—which is another way of saying that one who goes into an employment knows, or may learn, that among its inherent risks are things which greater care on part of the master might prevent, and that, therefore, the defense of assumption of risk is not wholly based on the claim that without such defense the master would be held when in no degree at fault. 3 Labatt, Sec. 1288, page 3616, asserts that the older authorities construe the words "assumed risk" to cover the defense of contributory neglect as well as that of a contractual assumption of risk, and that this is the correct theory.

Assumption of risk, waiver, and contributory negligence have been treated as interchangeable in Alabama—*Eureka Co. v. Bass*, 81 Ala. 200; and so of *Donahue v. Enterprise E. Co.*, 32 S. C. 299 (11 S. E. 95); and also of Missouri—see *Thorpe v. Missouri Pac. R. Co.*, 2 S. W. 3; *Alcorn v. Chicago & A. R. Co.*, 18 S. W. 188; *Bender v. St. Louis & F. R. Co.*, 37 S. W. 132.

In *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, the doctrine is put upon peculiar ground—in effect, that, when the servant assumes the inherent risk, he may not recover, because so assuming is a species of negligence on his part; that the assumption in the broad sense "obviously shades into negligence as commonly understood," and that "the preliminary conduct of getting into the dangerous employment or relation is said to be accomplished by the assumption of the risk." The same case indicates strongly that there is little substantial difference between this assumption and contributory negligence, and the text of law writers, and the reports, are full of positive declarations that the two are practically interchangeable.

In *Greef Bros. v. Brown* (Kans.), 51 Pac. 926, assumption

of risks is spoken of as being "a species of contributory negligence." A long line of decisions in Wisconsin, commencing with *Nadau v. White River Lbr. Co.*, 76 Wis. 120, and ending with *Willette v. Rhineland Paper Co.*, 145 Wis. 537, accept the theory that assumption of risks is "a form of contributory negligence." *In re Opinion of Justices* (Mass.), 96 N. E. 308, is not an authority either way. It is therein held to be a valid statute which enacts that it shall be no defense that the employe was negligent. That is not a provision that the master must pay, though wholly free from fault, but that he must do so although the servant be in fault. The statute, in effect, takes away the defense of contributory negligence. It is manifest that it does not fix absolute liability on the master because both master and servant may have been negligent. It is a defense with the servant's negligence, and not the entire freedom of fault on part of the master, which the Massachusetts statute deals with.

If assuming the risk amounts to contributory negligence, it cannot be that it assumes only that for which the master is blameless, because there cannot be contributory negligence unless there be negligence to contribute to.

We say, in *Miller v. White Bronze Mon. Co.*, 141 Iowa, at 712, that "of course, facts showing contributory negligence may also prove assumption of risk." We say in the same case that "assumption of risk is, in effect, a waiver of defects and dangers, and a consent on the part of the employe to assume them." And that "this consent is held to take away the injurious character of defendant's act and is bottomed on the old maxim, *Volenti non fit injuria*—that to which a party assents is no wrong." Substantially, this is the holding of *Thomas v. Quartermaine*, L. R., 18 Q. B. 685, and in *Rase v. Minneapolis, St. P. & S. S. M. R. Co.* (Minn.), 120 N. W. 360.

In *Yarmouth v. France*, L. R., 19 Q. B. 647, it is said that, before the Employer's Liability Act, there was this condition in the act of hiring: that if there was a defect in the premises or machinery which was open and palpable, whether the

servant actually knew it or not, he accepted the employment subject to the risk, and "that is the doctrine which is embodied in the maxim." In *Mad River & L. E. R. Co. v. Barber*, 5 O. St. 541, it is laid down that "If the agent or employe waived the omission of duty on the part of the employer he takes the risk upon himself, and if damaged, he must abide by the maxim." In *Schlemmer's* case, 205 U. S. 1, it is said that in this class of cases the risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, and that this holding is a recognition of a general principle of the law.

Mr. Labatt, in Vol. 5 of his work (2d Ed.), Sec. 1989, states that the principle embodied in the maxim is recognized, and will preclude recovery in circumstances appropriate for its application; and the following cases hold that the maxim is to be regarded as the embodiment of a comprehensive principle of which the servant's contractual assumption of common risk is one application: *Gibson v. Pacific R. Co.*, 46 Mo. 163; *Louisville, N. O. & T. R. Co. v. Conroy* (Miss.), 56 Am. Rep. 835; *Devitt v. Pacific R. Co.*, 50 Mo. 302; *Mundle v. Hill Mfg. Co.* (Me.), 30 Atl. 16; *Fitzgerald v. Connecticut R. P. Co.* (Mass.), 29 N. E. 464; *Creswell v. Wilmington & N. R. Co.* (Del.), 43 Atl. 629.

And in *Choctaw, O. & G. R. Co. v. Jones* (Ark.), 92 S. W. 244, it is held that the defense of assumed risk comes within the principle expressed by the maxim.

Some of the cases put it on the ground that it is a contract in the nature of a waiver in advance of damages that may accrue.

Very many cases hold that this so-called assumption of risk inheres in the contract of employment. *Martin v. Des Moines Ed. Light Co.*, 131 Iowa 724; *Miller v. White Bronze Monument Co.*, 141 Iowa, at 712; 8 Thompson's Commentaries on Law of Negligence, White's Supplement, Sec. 4608; *Lovell v. De Bardelaben Coal & Iron Co.* (Ala.), 7 So. 756; *Faulkner v. Mammoth Mining Co.* (Utah), 66 Pac. 799; *Smith v. Baker*,

L. R. (1891) A. C. 325, 355, per Lord Watson; *Thomas v. Quartermaine*, L. R. 18 Q. B. 685; *Yarmouth's case*, *supra*.

In *St. Louis Cordage Company v. Miller*, (C. C. A.) 126 Fed. 495, the syllabus written by the circuit judge asserts that it rests on contract; the opinion rests it upon contract, and upon *volenti non fit injuria*, and in *Glenmont Lumber Co. v. Roy*, (C. C. A.) 126 Fed. 524, the same judge rests it on the "right to contract;" and see *Narramore v. Cleveland, C. C. & St. L. R. Co.*, (C. C. A.) 96 Fed. 298, as construed in *Green v. Western Am. Co.* (Wash.), 70 Pac., at 314, 315, left column. On the other hand, it is held that the doctrine is not based on contract. *Rase v. Minneapolis, St. P. & S. S. M. R. Co.* (Minn.), 120 N. W. 360; *Denver & R. G. R. Co. v. Norgate*, (C. C. A.) 141 Fed. 247, 253; *Choctaw, O. & G. R. Co. v. McDade*, 24 Sup. Ct. Rep. 24; *Texas & P. R. Co. v. Archibald*, 18 Sup. Ct. Rep. 777; *Central Vt. R. Co. v. Bethune*, (C. C. A.) 206 Fed. 868; *Worden v. Gore-Meehan Co.* (Conn.), 78 Atl. 422.

We say, in *Martin v. Chicago, R. I. & P. R. Co.*, 118 Iowa, at 151, that as to whether one who undertakes work with knowledge that his employer is ignoring the ordinance and continues at work without complaint, after ascertaining this, assumes the risk of the danger incident to this violation, the authorities are in sharp conflict; that those holding that such a risk is never assumed go on the theory that, as an assumption of risk is based on an implied contract, it would be opposed to sound public policy to prevent one to agree in advance to a violation of a statute or city ordinance; that others say assumption of risks is a term of the contract of employment by which the servant agrees that dangers of injury, obviously incident to the discharge of the servant's duty, shall be at the servant's risk; that, on this theory, no right of action arises for the servant at all, because, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly to assume; and that, therefore,

the master is not guilty of actionable negligence towards the servant.

Again, it is supported on certain grounds urged in economic theories, and at other times is imputed because of a conception of justice and convenience.

Now it is clear to demonstration that, whensoever it is held that the defense of assumption of risk is based on the doctrine that an injury is not done to the willing, and that to which a person assents is not esteemed, in law, an injury, or that it presents the defense of contributory negligence, or is held to be something other than a claim that the master is wholly free from fault, the defense is not rested upon the assertion that the master is free from fault, but that the servant made a venture with his eyes open to its possibilities, and must not complain of what results therefrom.

The foregoing all tends to demonstrate that the defense of assumption of inherent risks has been put upon so many bases as that, where the legislature expressly provides methods for controverting whether the master was shown to be wholly blameless, we should not impute to it a construction that the defense of assuming risks inherent to an employment is equivalent to a claim that an injury was due to no fault of the master. We should not impute this construction unless no other is possible. So far from finding this to be the situation, we think everything indicates that no such definition of the defense was in the legislative mind when it enacted the legislation now in hearing.

C.

There is an additional and thoroughly well established and fortified line of reasoning upon which we must reach the same conclusion; and that is, that the courts should never

give construction to a statute which will render it unconstitutional, or which may even, create serious doubts as to constitutionality; if any other construction be possible, within the bounds of reason.

7. CONSTITUTIONAL LAW: construction, etc.: constructions leading to invalidity: avoidance.

It is possible to claim that the right to make the master absolutely liable is recognized in *Sexton v. Newark Dist. Tel. Co.* (N. J.), 86 Atl. 451, and *City of Chicago v. Sturges*, 32 Sup. Ct. Rep. 92. For the purposes of the argument, we may concede that these cases so hold, but the overwhelming preponderance, in numbers at least, is to the contrary.

In *Parrot v. Wells-Fargo Co.*, 15 Wall. (U. S.) 524, the plaintiff, who was the common landlord of the defendants and other tenants, sought to hold the defendants liable for damages occasioned to the premises occupied by the other tenants by an explosion of nitro-glycerine, which had been delivered for shipment to the defendants as common carriers. It appeared that the defendants were innocent, ignorant of the contents of the package containing the dangerous explosives, and that they were guilty of no negligence in receiving or handling them. Upon these facts, the Federal Supreme Court held that it was a case of unavoidable accident, for which no one was legally responsible.

In *Ohio & M. R. Co. v. Lackey*, 78 Ill. 55, the question was whether the railroad company was liable under a statute which provided "that every railroad company running cars within this state shall be liable for all the expense of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision or other accident occurring to such cars, or otherwise." The act was held invalid because it attached this liability in cases where no default or negligence of any kind on part of the railroad company existed.

To the same effect are numerous cases arising under statutes imposing on railroad corporations absolute liability for killing or injuring animals upon their right of ways by running over them, which all hold such to effect a deprivation of property without due process of law. *Jensen v. Union Pac. R. Co.* (Utah), 21 Pac. 994; *Zeigler v. South & N. A. R. Co.*, 58 Ala. 594; *Birmingham Min. R. Co. v. Parsons* (Ala.), 13 So. 602; *Bielenberg v. Montana U. R. Co.* (Mont.), 20 Pac.

314; *Schenck v. Union Pac. R. Co.* (Wyo.), 40 Pac. 840; *Cottrel v. Union Pac. R. Co.* (Idaho), 21 Pac. 416.

And while statutes compelling fencing upon pain of additional liability are valid, it is said by Black, in his work on Constitutional Law (2d Ed.), page 351, that even such statutes cannot go beyond imposing a penalty "in cases where the fault lies at the door of the company. If the law attempts to make such companies liable for accidents which were not caused by their negligence or disobedience of the law, but by the negligence of others, or by uncontrollable causes, or does not give the company opportunity to show these facts in its own defense, it is void." See *Steffen v. Chicago & N. W. R. Co.* (Wis.), 50 N. W. 348; *Lewis v. Flint & P. M. R. Co.* (Mich.), 19 N. W. 744; *Bennett v. Ford*, 47 Ind. 264; *Brown v. Collins*, 53 N. H. 442; *Gibbs v. Tally* (Calif.), 65 Pac. 970; *Denver & R. G. R. Co. v. Outcalt* (Colo.), 31 Pac. 177; *South & N. A. R. Co. v. Morris*, 65 Ala. 193; *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 641; *Birmingham Min. R. Co. v. Parsons* (Ala.), 13 So. 602.

We have no occasion to decide, and therefore express no opinion on, whether making the master liable absolutely is within the power of the legislature. All we do is to point out that, in the light of the cases to which we have referred, it was, at the time when the Iowa legislature acted, at least a matter for reasonable difference of opinion whether holding the employer to respond when wholly free from blame is a valid exercise of legislative power. Upon this premise, we apply elementary rules of statute construction, to wit, that all doubts shall be resolved in favor of constitutionality (*Dutton Phosphate Co. v. Priest* [Fla.], 65 So. 282; *Cincinnati, W. & Z. R. Co. v. Commissioners*, 1 O. St. at 85), and that it is the duty of the court to give a statute such construction, if possible, as will not render it unconstitutional. *Santo v. State*, 2 Iowa 165, 208; *State ex rel. Weir v. County Judge*, 2 Iowa 280; *Duncombe v. Prindle*, 12 Iowa 1; *Iowa Homestead Co. v. Webster County*, 21 Iowa 221.

"It is elementary when the constitutionality of a statute is assailed if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional, and by the other valid, it is our plain duty to adopt that construction which will save the statute from reasonable claim that it is unconstitutional." *United States v. Delaware & H. Co.*, 213 U. S. 366; *Knights Templars' Indemnity Co. v. Jarman*, 187 U. S. at 205.

And in the words of the Supreme Court of the United States, in *Harriman v. Interstate Com. Commission*, 211 U. S. 407:

"If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits."

We must assume that the legislature had some knowledge of the state of the case law when it acted. Construing its act with desire to hold it valid, we should further assume that the law makers took this case law into consideration, and intended to avoid the doubts arising upon such consideration—intended to enact what was clearly valid rather than what seemed at least of questionable validity. We therefore should and do hold that, as the defense of assuming inherent risks of employment does not necessarily mean assuming injury for which the employer is blameless, and no other injuries, and as holding that such assumption does mean such injuries would be a construction which might raise doubts as to the validity of the act, it is our duty, under said rules of construction, to hold that the abolition of said defense of assumption did not enact that utter want of fault on part of the employer is no defense, and so make useless plain and apparently well-considered provisions of the same statute.

It will not be out of place to repeat here the text in 3 Labatt (2d Ed.), Sec. 1186a, pp. 3189, 3190:

"It should be noted that statutes which in terms abolish the doctrine of assumption of risk as a defense go no further

than to abolish the defense where the servant is injured by reason of the master's negligence, and do not abolish assumption of risk where the master has not been negligent."

We are abidingly of opinion that the act did not abolish the assumption of risk last referred to in the quotation.

III. In support of the claim that such absolute liability has been created by the act in consideration, three further "arguments" are urged upon us: First, "primitive" German

8. CONSTITUTIONAL LAW: construction, etc.: "eighteenth century Constitution;" "twentieth century conditions."

law and the common law recognize that fault

of the master is not essential to recovery from

him by the servant; that this doctrine is still

recognized in our jurisprudence; that, under

respondeat superior, a master free from personal

fault must pay if one of his servants be

injured by the fault of another; that, in amplification of these, railroads have quite universally been held absolutely liable for injury to passengers, for damage to goods carried, and for fire set by their locomotives. Second, we are told, with much elaboration, frequently fortified by quotation from "court decisions," that the establishing of absolute liability is just; necessary to changed conditions; beneficial to both employer and employe; a means of bettering citizenship; a relief to the courts and the taxpayers who maintain the courts and litigants; an eliminator of perjury; and by preventing the loss of substantial rights through what are deemed technicalities, an agent for restoring lost confidence in the courts. Third, that "an eighteenth century Constitution" should be interpreted by something broader and more liberal than "an eighteenth century mind," should be construed "in the light of eighteenth century conditions and ideals;" and that any other attitude is "to command the race to halt its progress; to stretch the state upon a veritable bed of Procrustes."

The entire argument resolves itself into demonstrating that the legislature has and has been held to have the power to create absolute liability; that it is necessary and salutary that it should create it; and that the Constitution should be

read with progressive and liberal eyes. We may concede freely that all this should have consideration upon the question of what a duly enacted law is intended to effect. But, it having been admitted that prior to the enactment of the compensation law the Iowa employer was not under this absolute liability, and that, if there is such liability now, it is created by this particular enactment, just how are all these considerations relevant to the inquiry whether the legislature of Iowa *has* exercised that or any other power in a particular statute enacted by it? That being the range of the inquiry, how does the fact that the legislature has the right to make the change claimed, if it wishes to, bear upon whether, by means of this particular statute, it has seen fit to exercise such right?

“The right of property rests, not upon philosophical or scientific speculations, nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the law.”

That can be made or changed by the people, but not by courts.

“In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval, but courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided.”

2.

Not only are these contentions irrelevant, but some of them are open to criticism that goes deeper than irrelevancy.

The rules for dealing with the fundamental law that are urged upon us present, in effect, an assertion that the judges of the present day may repeal the Constitution whenever, in their opinion, that instrument is out of harmony with “the light of twentieth century conditions and ideals.” This is akin to the other theory that judges should create law whenever convinced that it is salutary and demanded by the people.

The age of the Constitution, and the enlightenment and progressiveness of the judge have not the slightest bearing upon whether a legislature has or has not made some particular thing into law. Nor is the Constitution a public enemy whom judges are charged to disarm whenever possible. It is the protector of the people, placed on guard by them to save the rights of the people against injury by the people. To hold that attack upon it is for the public good is to commend the soldier for tearing down the rampart which enables him to sleep in safety. The age of the Constitution may develop conditions which make it desirable to amend it; until amended, it is a holy covenant which judges are not at liberty to emasculate by urging a species of statute of limitations. The oath of the judge to support it has neither an express nor implied exception that the oath shall not be binding after the Constitution has been in existence for a stated or any length of time. Unless amended, it will be the duty of the judges who serve a hundred years from now to obey this Constitution. The judge can give no more irrefragable evidence of his utter unfitness for his high trust than that he allows his notions of necessity and justice, or his responsiveness to the public will, to influence him in determining whether a law has been enacted. And in no conceivable case may the just judge give effect to legislation which clearly violates the fundamental law. None but foresworn judges will yield in these to any degree of necessity or pressure of public opinion, or disregard the Constitution because it was created in the eighteenth or nineteenth century. Those who insist most strongly that the courts shall legislate, or set aside the Constitution in a given way and case, will be the most clamant in condemning any such action when it interferes with law that they favor.

We cannot close this subject with words more apt than those written by Mr. Justice Marshall, in concurring with the decision which sustains the validity of the Wisconsin Compensation Act (*Borgnis v. Falk*, 133 N. W. 209):

“The remarks on the court’s opinion which may suggest

to some that a different meaning is to be read out of the Constitution now than formerly; that it may have meant one thing when framed and later another, and now be held differently, according to judicial interpretation to meet social necessities as recognized by human instrumentalities in the particular environment—probably was not so intended, but I sense danger of a contrary impression going out. Such ability to bend the fundamental law in the name of judicial interpretation,—the idea that an eighteenth century construction for an eighteenth century condition may not, and at the hands of the court does not have to, fit a twentieth century condition,—has been advanced by some, but not significantly at least by any court. On the contrary, it has met with universal condemnation. That it is wrong, every man of eminence that has ever written upon the subject in the past, as well as the very nature of the case and the very logic and limitations of judicial interpretation, bear witness. The fertile method of dealing with the Constitution has been characterized as one which has ‘furnished a mode of argument which would on the one hand leave the Constitution crippled and inanimate, or on the other give it an extent of elasticity subversive of all rational boundaries.’ Story, Constitution, 389.”

We concede freely that we should apply anything that is in the Constitution to conditions now existing, and that it was prophetic enough so that it may apply to what may not have existed when it was made. But we deny that we can put things into the Constitution or use it improperly because our present needs might be advantaged by so doing.

The court erred in denying the defense that defendant was wholly free from fault.

DIVISION II.

Having held that the act does not take away the defense that the master was wholly free from negligence, and that,

therefore, it cannot be violative of fundamental law because of eliminating such defense, it is possible that, upon retrial, the defendant may have a verdict upon such defense. In such circumstances, we would ordinarily decline to consider whether other features of the statute are open to constitutional objections. But as the reluctance of the courts to make inquiry into the power of the legislature to act is, after all, a mere rule of comity between co-ordinate departments of the government, and as the parties have fully argued all objections to the act, and have expressed a desire that the entire controversy be passed upon, and say that so to do is desirable for the good of the public, and as, owing to the full presentation, what we shall say cannot be treated as obiter, we have concluded that we should not here insist upon this rule of comity, and we proceed to entertain the entire submission.

I. There are some matters presented which should not be allowed to clog the disposition of what is truly here for decision.

Both parties fully present the questions of substance whether the act is constitutional, and of how some vital parts of it should be interpreted. Both treat the appeal as a test of this law. In such circumstances, we must decline to pass upon assignments such as that plaintiff should not have had judgment because the petition fails to show that he gave a required notice, or show that he rejected the law; and because he does not plead that he was not intoxicated when injured. No possible ruling upon these would accomplish, or aid in accomplishing, the confessed object of the appeal.

It is the tendency of arguments asserting that legislation is violative of constitutions to be hypocritical, and the one at bar is not exceptional in this regard. In this, an appeal by an employer, it is urged that the right of rejection by the employe is unduly clogged; first, because of the requirements concerning the form and verification of the notice; and second,

9. APPEAL AND
ERROR: assign-
ments of er-
ror: assign-
ments foreign
to object of ap-
peal.

because the sufficiency of these is to be passed on by the commissioner and the act is challenged because Section 3 authorizes the commissioner to return a rejection by the employe if it fails to comply in form or verification with the requirements of the act, it being urged that this is power to construe contracts against their terms. And there is a contention that the act is void because it interferes with the exclusive jurisdiction of the Federal courts of actions for injuries of employes of railroads, in that injuries to such employes are not excepted in the act. Sec. 22 of the act guards against this very interference with Federal law. But, in any view, the alleged interference does not concern appellant.

If there is any sphere within which a statute may validly operate, it should, within that sphere, be made effective in appropriate proceedings taken for that purpose. While the

10. CONSTITUTIONAL LAW :
construction,
etc. : borrowed objec-
tion.

application of the statute in a particular case may violate organic law, it may not be unconstitutional as framed when limited to its proper application. *Dutton v. Priest* (Fla.),

65 So. 282. The employer cannot be heard to urge a grievance of the employe in attacking a compensation act. *Jeffrey Mfg. Co. v. Blagg*, 35 Sup. Ct. Rep. 167; *Jensen v. Southern Pac. R. Co.* (N. Y.), 109 N. E. 600.

As is said in *Dutton's* case (Fla.) 65 So. 282, attacks upon the constitutionality of a statute will not be sustained on the ground that it *may* be so construed as to invade private rights secured by the Constitution, and that he who makes the attack must show that, in the case he presents, the effect of applying the statute is to deprive *him* of a constitutional right.

2.

Workmen's acts and the like may validly interfere with existing contracts, if it be done by a proper exercise of the police power. See *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549; *Philadelphia, B. & W. R. Co. v. Schubert*, 32 Sup. Ct. Rep. 589; *Sexton v. Newark Dist. Tel. Co.* (N. J.), 86

Atl. 451; *State ex rel. Pratt v. City of Seattle* (Wash.), 132 Pac. 45; *State ex rel. Yapple v. Creamer* (Ohio), 97 N. E. 602. But this is for consideration later. And if acceptance of the act is elective, then, as will be seen later, the statute cannot work an impairment. Whenever liberty is left on whether to contract at all (which liberty is assumed for present purposes), then a new contract or a change in contract, made by contract, cannot be objected to as an invalid impairment. Of course, parties *sui juris* and at liberty can make new contracts that modify or obviate existing ones without running counter to any constitutional inhibition.

It suffices, for present discussion, that the statute at bar has not a suggestion that existing contracts are within its contemplation. On the contrary, it provides expressly that existing conditions are not to be affected.

11. CONSTITUTIONAL LAW :
construction,
etc. : theorized
condition : impairment
of contract.

Section 51 is, that Part 1 of the act shall take effect from and after July 1, 1914, and Parts 2 and 3 from and after July 4, 1913; that if either serves notice to reject not less than 30 days before July 1, 1914, when Part 1 takes effect, such notice shall have the same force and effect as though Part 1 had taken effect July 4, 1913. Chapter 148 of the Acts of the Thirty-fifth General Assembly, however, enacts that the compensation act shall not apply to injuries sustained which occur prior to the times when the compensation act takes effect in all its parts, and that the law and procedure in force at the time such injury occurs, if before such act takes effect in all its parts, shall be the same as though such act had not been enacted, whether the action is brought before or after the act takes effect in all of its parts. But by some process of reasoning, not clear to us, the conclusion is reached by appellant that the statute in some way does impair the obligation of existing contracts. It may be conceded, for present purposes, that, by possibility, conditions might arise in the application of the statute which would present the question whether it does impair an existing contract. It will be time enough to pass

upon the validity of the act as affected by such potential case when such case arises; and it is not amiss to say at this time that the courts will labor diligently to avoid a construction which imputes to a statute the impairment of existing obligations, and will hold that that is not the true interpretation, if any other is in reason attainable. Lewis' Sutherland's Statutory Construction, Sec. 335, and cases cited. And as said in *Dutton's case*, *supra*, we should not nullify a law merely because it is *possible* to construe invalidity into it, nor until complaint is made by one who is being injured by what he complains of.

There is no limit to the injection of academic discussions into an arraignment of a statute, if once the field of possibilities merely be entered. But the fundamental and justified reluctance of the judiciary to sit in judgment upon the acts of its co-ordinate readily accounts for it that it is the well-settled rule to indulge in no such interference by theorizing upon strained contingencies. In the language of *Railway v. Commissioners*, 1 O. St., at 84, approving *City of Lexington v. McQuillan's Heirs*, 9 Dana (Ky.) 513:

"We should be justly chargeable with wandering from the appropriate sphere of the judicial department, were we, by subtle elaboration of abstract principles and metaphysical doubts and difficulties, to endeavor to show that such a power may be questionable, and on such unstable and injudicial ground to defy and overrule the public will, as clearly announced by the legislative organ."

In *Noble State Bank v. Haskell*, 31 Sup. Ct. Rep. 186, the court said:

"In answering that question we must be cautious about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a cer-

tain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power."

Again, in the same case, the court was asked whether the state could require all corporations or all grocers to help guarantee each other's solvency, and where the line was to drawn, and the answer was: "The last is a futile question and we will answer the others when they arise."

We should consider practical experience as well as theory in deciding whether a given plan in fact constitutes a taking of property, or something else that is in violation of the Constitution.

DIVISION III.

The constitutionality of the act is challenged, speaking in general terms, because:

1. It interferes with the right to contract, generally, and, specifically, by fixing a scale of compensation to be made by the employer to the injured employe.

2. It makes arbitrary discriminations by means of improper classifications, and is, so, improper class law.

3. It improperly delegates judicial power and substitutes a hearing and determination which is not due process of law for the right to have due hearing in a proper court.

4. It misuses the taxing power in providing a system by which the employer takes out insurance to assure payment of compensation to his employe.

5. On the whole, it denies due process of law; deprives the defendant of property without due process, and abridges the privileges and immunities of the defendant as a citizen of the United States.

- I. Section 8 prohibits any contract, rule, regulation or device whatsoever that shall operate to relieve the employer,

in whole or in part, from any liability created by the act, except as the act provides. Section 18 is that every device by which the employe is to pay an insurance premium against the compensation provided in the act is null and void, and no wages may be withheld to pay such premium, under penalty by fine; and the employe shall have no power to waive any provisions of the act if thereby is lessened the statute compensation. And Section 13 provides that the amount of compensation fixed by the statute may not be reduced by contribution from employes.

In essence, these are guards against contracts to reduce liability for negligence, and, so far from being an invasion of the right to contract, are precautions against allowing the employer to first accept the act and then avoid its provisions by subterfuge. It is no interference with the right to make agreement that the legislature enacts what it thinks will prevent the breach of an agreement entered into. What is taken away is not the right to bargain, but the right, by deviousness, to break the bargain made.

Aside from that the right to make contracts is not infringed by statutes aimed to insure compliance with contracts entered into, it should not be claimed at this late date that the legislature has no power to prevent contracts between master and servant which fix a low price for, and so stimulate, the killing and maiming of men—contracts which the employe may feel compelled to make to obtain or retain employment.

Section 2071 of the Code, as amended by Chapter 49, Acts of the Twenty-seventh General Assembly, and Chapter 124, Acts of the Thirty-third General Assembly, which is not questioned, expressly provides as to employes of railroads, "No contract which restricts such liability shall be legal or binding." This phase of the statute has had the approval of this court and of the Supreme Court of the United States. In the *McGuire* case, which was sustained by the Supreme Court of

12. CONSTITUTIONAL LAW: right to contract: invalidating contract: workmen's compensation act.

the United States (219 U. S. 549), it is held not to be an inhibited impairment of contract or infringement of the right to contract, to enact that the acceptance of the benefits in a relief department shall not operate as a release and satisfaction of all claims against the employing railroad company. In the *Opinion of the Justices* (Mass.), 96 N. E. 308, it is ruled that the legislature can say that no agreement by an employe to waive his rights to compensation under the Workmen's Compensation Bill shall be valid. The Supreme Court of the United States has held that Congress may, with reference to the Employers' Liability Act of April 22, 1908, declare, validly, that any contract, rule, regulation or device, the purpose or intent of which is to enable the carrier to exempt itself from the liability therein created, shall be void. See *Mondou v. New York, N. H. & H. R. R. Co.*, 32 Sup. Ct. Rep. 169. That is the holding of *State v. Clausen* (Wash.), 117 Pac. 1101, and of *Philadelphia, B. & W. R. Co. v. Schubert*, 32 Sup. Ct. Rep. 589. *Railway v. Schubert, supra*, and *Sawyer v. El Paso & N. E. R. Co.* (Tex.), 108 S. W. 718, so hold as to statutes which declare that acceptance of benefits under a contract of membership in a railway relief department, and such contract of membership, shall not operate as a bar to the recovery of damages for the injury or death of an employe, and that any agreement to that effect is void.

2.

Section 3 provides that if, by or on behalf of the employer, any request, suggestion or demand be made that an employe or one seeking employment shall exercise his right to reject the act, there shall arise a conclusive presumption that the employe or applicant was unduly influenced to exercise this right; that the rejection made under such circumstances shall be conclusively presumed to have been procured through fraud, and be null and void.

Section 19 is that any contract or agreement made by any employer, or anyone acting for him, with any employe or other

beneficiary, as to any claim under the provisions of the act, within twelve days after injury, shall be presumed to be fraudulent.

Both these are charged to interfere with the freedom of contract. The first, which makes fraudulent rejection by the servant, if influence has been brought to bear by the employer, is nothing more or less than an exercise of the right of public self-defense. Assuming that there can be a valid compensation act, certainly the legislature may make provision against having the legislative intent as to such act thwarted. To put the ban upon such influences interferes with no right of contract, but simply heads off one method of evading or crippling the act. One underlying purpose of the statute is to promote acceptance by the employe. No valid right is infringed by making taboo the employment of methods that might press the employe to reject. The legislative policy with us is to discourage the sale of intoxicating liquors, and we have a statute, the validity of which has not seriously been questioned, that if one obtain the sale of liquor to him, in violation of law, and pay therefor, he may recover back the payment; if he has not paid, he may defeat the seller's suit for payment. No one thinks these infringe the right to contract; they are proper devices against interference with the policy of the law.

In view of the provision that all agreements to lessen the statute liability are wholly void, the provision concerning the presumption as to agreements made within twelve days after injury is of doubtful need or use. If such agreement made within the twelve days is not for less than the statute compensation, the act does not condemn it. If it is for less, said other provisions make it absolutely void, rather than presumptively fraudulent. But be that as it may, it again is an exercise of proper legislative policy to guard against the chance of obtaining contracts unfair to the employe, at a time when the legislature may well assume that his physical distress and possible financial condition make him unusually

amenable to pressure directed to a waiver of his just rights. It is merely an attempt to prevent fraud in dealing with the servant at a time when, in all probability, he is still undergoing so much suffering as that he may readily be taken advantage of. And, surely, if any and all contracts for less than statute indemnity may validly be declared void *in toto*, there can be no serious claim made against the validity of one which does not of itself invalidate the contract (which it might lawfully do), but merely changes the burden of proof as to the validity of such contracts.

To now, we have dealt with the question now in review as though there were no power in the legislative branch to interfere with the making of a contract, unless its making is in some clear sense a defeat of legislative policy, exercised in forbidding just such contract. Whatever of this aspect the discussion has so far worn is due to an assumption for the sake of argument.

There is power in the legislature to abridge the right of contract in the exercise of what may be termed the general power of community self-defense—the police power—a power already herein adverted to.

3.

13. CONSTITUTIONAL LAW:
police power:
right to contract: limitations.

While the right to contract is a property right, like all other property rights it is "subservient to the public welfare," and may be taken by the state in a well-directed effort to promote the public welfare by the exercise of the police power. *Borgnis v. Falk* (Wis.), 133 N. W. 209. It all flows from the old announcement made by Blackstone, that, when men enter into society, as a compensation for the protection which society gives to them, they must yield up some of their natural rights.

"The 14th Amendment, however, does not guarantee the citizen the right to make within his state, either directly or indirectly, a contract the making whereof is constitutionally forbidden by the state." *Hooper v. California*, 155 U. S. 648.

The right is "subject to certain limitations which the state may lawfully impose in the exercise of its police power." *Holden v. Hardy*, 169 U. S. 366. The liberty of contract is "subject to the restraints demanded by the safety and welfare of the state." *St. Louis, I. M. & St. P. R. Co. v. Paul*, 173 U. S. 404. To like effect is *State v. Buchanan*, 29 Wash. 602. "It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts." *Frisbie v. United States*, 157 U. S. 160. No contract may limit the exercise of the police power to the prejudice of the general welfare. *Butchers' Union Co. v. Crescent City Co.*, 4 Sup. Ct. Rep. 652.

The following acts have been sustained, against objection that they impinge upon the protection of contracts and of the right to contract afforded by the Constitution of the United States: A statute fixing minimum charges for the storage of grain and prohibiting contracts for larger ones (*Munn v. Illinois*, 94 U. S. 113); prohibiting attorneys from contracting for a larger fee than \$10 for prosecuting pension claims has been held to be a valid exercise of the police power (*Frisbie v. United States*, 157 U. S. 160); so of a statute making it unlawful for employes to work in laundries between the hours of ten P. M. and six A. M. (*Soon Hing v. Crowley*, 113 U. S. 703); an act making it unlawful for any contractor engaged upon a work of public improvement to require or permit any employe to work more than eight hours per day (*Atkin v. State of Kansas*, 24 Sup. Ct. Rep. 124); a statute which forbids a railway employe to contract to assume the risk of hazardous employment or unsafe place to work (*Kilpatrick v. Grand Trunk R. Co.* [Vt.], 52 Atl. 531); or contract excluding defense of other assumptions of risk (*Missouri, K. & T. R. Co. v. Bailey* [Tex.], 115 S. W. 601; *El Paso & S. W. R. Co. v. Alexander* [Tex.], 117 S. W. 927); preventing miners employed at quantity rates from contracting for wages upon the basis of screened coal, instead of the weight of the coal as originally produced in the mine (*McLean v. State of*

Arkansas, 29 Sup. Ct. Rep. 206); an act of Congress making it a misdemeanor for a ship master to pay any part of wages in advance (*Patterson v. Bark Eudora*, 190 U. S. 169); and an act requiring the redemption in cash of store orders or other evidence of indebtedness issued by employers in payment of wages to employes (*Knoxville Iron Co. v. Harbison*, 183 U. S. 13). In *McGuire v. Chicago, B. & Q. R. Co.*, 131 Iowa 340, (219 U. S. 549), the police power sustained a prohibition against reducing liability by means of contractual contribution by the employe to a mutual relief association. Statutes regulating common carriers, pawnbrokers, auctioneers, the inspection and sale of food, providing for mechanics' liens, fixing the age at which persons shall be deemed competent to contract, prescribing the form of promissory notes for a patent right, and the like, limit the natural liberty of contract, but are universally recognized to be safely within the police power.

In *Carter v. Craig* (N. H.), 90 Atl. 598, there is sustained an act imposing a tax on property passing by deed, grant, sale or gift made to take effect in possession or enjoyment after the death of the grantor, with purpose to prevent the use of such conveyances to avoid the payment of taxes on property passing by will, against objection that it is a limitation on the freedom of contract secured by the bill of rights.

In *Cunningham v. Northwestern Imp. Co.* (Mont.), 119 Pac. 554, there is sustained the right of the legislature to pass laws regulating an extra hazardous business, such as coal mining, and to provide for benefits in case of injury or death, and this is put upon the ground that it involves an intention to reduce economic waste, to obviate breaches and dissensions between employers and employes, raises the standard of citizenship, lowers the general burdens of taxation thereby, promotes peace, order and morals, and, ultimately, that such an act is a proper exercise of the police power. Under *Giozza v. Tiernan*, 148 U. S. at 662, this reasoning upholds all enactments which promote the health, morals and education of the citizen, and good order. In *Crowley v. Christensen*, 137 U. S.

86, the police power is said to authorize the regulation of the pursuit "of any lawful trade or business," and that these regulations may be "almost infinite, varying with the nature of the business." In *McGuire v. Chicago, B. & Q. R. Co.*, 131 Iowa, at 360, this court, speaking through Weaver, Judge, declares that "the relations between employer and employe are and always have been recognized as proper subjects of police regulation." In *Barbier v. Connolly*, 113 U. S. 27, the police power is held to sustain legislation which tends to increase the industries of the state, develop its resources and add to its wealth and prosperity. *Kentucky State Journal Co. v. Workmen's Comp. Bd.* (Ky.), 170 S. W. 1166, holds that the right to regulate the management of industries is within the police power, and that workmen's compensation acts are, in so far as they provide for employers' paying into the compensation fund provided for, though they deprive injured employes of a jury trial. Judge Brewer, in *Kansas Pac. R. Co. v. Mower*, 16 Kans. 573, said that this power is one "whose necessity and uses grow with the increasing complexities of our civilization and the increasing diversities in the industries and modes of life." It extends "to the protection of the lives, limbs, health, comfort and quiet of all persons." *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140, 149; *Railroad Co. v. Husen*, 95 U. S. 465. It has been expressly held that such acts as the one under consideration are sustained by the police power. *State v. Clausen* (Wash.), 117 Pac. 1101; *Stoll v. Pacific Coast Co.*, 205 Fed. 169; *Jensen v. Southern Pac. R. Co.* (N. Y.), 109 N. E. 600.

It may not be doubted that the exercise of the power must not be a mere pretense, and that its exercise is sanctioned only for uses properly within the scope of and the necessity for exercising the power—and that is all that may be claimed for the authorities that deal with the point, such as Cooley, Constitutional Limitations, Chapter 7; *Winter v. Jones*, 10 Ga. 190 (54 Am. Dec. 379); *Railway v. Milwaukee*, 97 Wis., at 422; *Lawton v. Steele*, 152 U. S., at 137; *Yick Wo v. Hopkins*,

118 U. S. 356; *Henderson v. Mayor*, 92 U. S. 259; *Soon Hing v. Crowley*, 5 Sup. Ct. Rep. 731, and *State v. Dalton* (R. I.), 46 Atl. 234.

It will be found that in the foregoing cases there were present laws or ordinances which were clearly a mere attempt to accomplish, in the guise of exercise of the police power, objects that were not a legitimate exercise of that power, or that the discussion proceeds upon what should be done when acts of the assembly or ordinances are of that character. None of this proves that "the entire chapter is unconstitutional and void (*inter alia*) because of being a false pretense merely." That a duly enacted statute is a mere colorable use of the police power is surely not to be presumed. On the contrary, courts will presume that such act is a legitimate exercise of legislative power, and not an attempt to evade the Constitution. *Hanly v. Sims* (Ind.), 94 N. E. 401. The courts do not and should not readily find that the legislature entertained such purpose. In the case of *McLean v. Arkansas*, 211 U. S. 539, 547, it is held that a statute should not be set aside by the judiciary unless it "is unmistakably and palpably in excess of legislative powers." It is said:

"The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference . . . and it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government."

In *Lochner v. New York*, 198 U. S. 45, an act regulating the hours of service of employes in baking establishments; in *Adair v. United States*, 208 U. S. 161, an act prohibiting the discharge of a servant because he is a member of a labor union; in *Street v. Varney Electrical Supply Co.*, 61 L. R. A. 154, a statute fixing a minimum wage of 20 cents an hour to

be paid to unskilled labor on public works, were respectively held void. In cases of the class of *Palmer v. Tingle*, 55 O. St. 423; *City of Cleveland v. Clements Co.*, 67 O. St. 197; *In re Preston*, 63 O. St. 428, and in *State v. Robins*, 71 O. St. 273, it is held that, for one reason or another, a statute impairing the right freely to contract as to hours of labor was unconstitutional. In the *Lochner* case, the decision is largely controlled by, if, indeed, it does not turn upon, the arbitrary singling out employes in a bakery for the subject of the statute. In *Adair's* case, the act is held to take from the employer the right to discharge the employe with or without reason—held there is no power in the legislature to say he must not discharge because the servant is a member of a labor union. In *Street's* case, the decision is that unskilled labor on public works should not be singled out for the benefit conferred by the statute, and that the legislature may not fix a minimum wage. In all of them was present a control of the right to contract without any election as to whether to submit to the statute regulation or not. Most, if not all, of them involve that the object of the whole act is not within the police power.

The manifest distinction is that the Iowa act leaves both employer and employe the liberty to accept or reject its provisions, and that its requirements in case of acceptance constitute a proper exercise of the police power—such exercise of it as would sustain compulsory acceptance.

II. It is charged that the act creates improper differentiations, because it is arbitrary to except from the operation of the act household or domestic servants, farm or other laborers engaged in agricultural pursuits, and persons whose employment is of a casual nature.

14. CONSTITUTIONAL LAW: equal protection of laws: classifications: workmen's compensation act.

As to this, we have to say, first, that such excepting has been quite generally sustained.

On complaint by a coal mining company

that a statute exempts household or domestic servants, farm or other employes engaged in agricultural pursuits, and persons whose employment is of a casual nature, and those engaged in clerical labor, it has been held that such differentiation between parties in the class to which defendants such as the one at bar belong, and some or all of these excepted persons, is not arbitrary, but natural and justified, and said that most laws must, in a sense, be special, and that strict equality is neither necessary nor practically obtainable. *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210; *Duncan v. Missouri*, 152 U. S. 377; *McGuire v. Chicago, B. & Q. R. Co.*, 131 Iowa 340 (81 Sup. Ct. Rep. 259, 264).

As we view it, substantially such differentiations as are here challenged have been sustained. *Dirken v. Great Northern Paper Co.* (Me.), 86 Atl. 320, sustains exclusion of those in domestic service and those engaged in agricultural pursuits; *Deibeikis v. Link-Belt Co.* (Ill.), 104 N. E. 211, the excepting those engaged in casual work and clerical and administrative employment in a branch of hazardous business. See *Borgnis v. Falk* (Wis.), 133 N. W. 209; *Consolidated Coal Co. v. People of Ill.*, 22 Sup. Ct. Rep. 616. And see also, *Soon Hing's case*, 5 Sup. Ct. Rep. 730; *Ives v. South Buffalo R. Co.* (N. Y.), 94 N. E. 431; *Jacobson v. Commonwealth of Mass.*, 25 Sup. Ct. Rep. 358.

We shall see, presently, that the power to classify is primarily in the legislature, that the courts accord it the widest latitude in performing this function, and that a classification adopted by it will be sustained unless it is so palpably arbitrary as that there is no room for doubt that discretion has been abused by indulging in an unjustifiable discrimination. Certainly, we should not say the legislature discriminated thus in determining that there were substantial differences in hazard and situation between those within the act and household or domestic servants, farm laborers engaged in agri-

cultural pursuits, and those in an employment of a casual nature. Certainly, such finding is in no view palpably arbitrary. On the contrary, it will be found to be the quite spontaneous belief of most men that such differences between these classes exist as reasonably justify the difference in treatment exhibited by the act.

Now, speaking as to the employes excluded, their exclusion is either the granting of a privilege denied to others or the imposition of a burden from which others are relieved. If

15. CONSTITUTIONAL LAW: construction, etc.: borrowed objection.

the last, it suffices that no excluded person is here complaining, and that appellant has no grievance because others are unfairly treated.

Speaking from the angle of those included, their inclusion is either a burden not placed on others or a privilege not shared by others. If the last, there is no grievance. One may not well complain of a discrimination consisting of his being treated better than others.

Assuming, for the time, that the act is not compulsory, then excluding these certain employes works discrimination neither against those excluded nor against those included. If

16. CONSTITUTIONAL LAW: equal protection of laws: classifications: optional application: effect.

it is at the option of those included whether they will take what the act gives, its operation upon them is due to consent on their part that it shall thus operate. All they need to do to prevent discrimination against them consisting of being included when others are

not, is to reject the act. The moment they reject, they are, for all practical purposes, as much excluded as those who are excluded by the words of the statute.

On the other hand, there is nothing in the act to prevent those excluded from making contracts by which they may have all that the statute gives to those who accept it. There is nothing in the statute which prevents a farmer and his laborer from entering into contract that, if the laborer be injured in the course of the employment, the employer shall

not make certain defenses, and that arbitrators, mutually agreed upon, shall award compensation, in accordance with the schedule contained in this act; and they may resort to the general arbitration statutes.

If both those included and those excluded are each permitted to and can readily put themselves into the position of the others, there would seem to be, at most, a purely academic discrimination against either.

2.

Next, we are asked to hold that the statute contains an improper classification and an arbitrary differentiation; because, as is claimed, if employer and employe both reject, the employe none the less takes the benefit of the act, and where the master accepts and the employe rejects, the one who rejects gets as much as the one who accepts. We might well dispose of this contention with saying that it deals with what is not in this case. But going beyond that, we find this to be the situation: Section 5 provides that where both reject, the liability of the employer shall be the same as though the employe had not rejected. But this does not stand alone. For paragraph B of Section 3 provides that, if the employe rejects, he must suffer in his suit for injury; that the employer may plead and rely upon "any and all defenses, including those at common law, and the rules and defenses of contributory negligence, assumption of risk, and fellow servant," with certain limitations; and Section 10 is that compensation under the act is to be awarded only if both have done what amounts to acceptance of the act. Construing all together, it is found that the act does penalize the employe who rejects. That the penalties imposed upon the master and the servant may not be precisely the same is, as will presently be seen, not vital, and does not sustain the broad assertion made, that an arbitrary difference is created as to the consequences of conduct which is, in substance, alike.

17. MASTER AND
SERVANT:
workmen's
compensation
act: rejection
by employe:
effect.

It may be well said, in passing, that such differences as do exist are sustained by the quite generally accepted doctrine that the freedom to contract is only in theory enjoyed by the employe as fully as by his employer, and that the police power may be invoked to sustain some differentiations in favor of the employe, on the theory that this is a method of protecting him for the public good against the actual inequality between him and his employer.

18. CONSTITUTIONAL LAW: equal protection of laws: workmen's compensation act: consequences attending acceptance and rejection.

3.

While it is undoubted that wholly arbitrary classification will not be sustained, such, for instance, as rests wholly on the nature of the employer's business, when it should rest upon difference in the nature of the employment—*Cleveland, C. C. & St. L. R. Co. v. Foland* (Ind.), 91 N. E. 594; *Indianapolis, T. & T. Co. v. Kinney* (Ind.), 85 N. E. 954; or where the exaction of a peddler's license is differentiated on whether the peddler be or be not a veteran of the Civil War—*State v. Garbroski*, 111 Iowa 496; or singling out from the general law of the state only such masters and servants as are railroad employers and employes; and though others are in like situation,—*Chicago, M. & St. P. R. Co. v. Westby* (C. C. A.), 178 Fed. 619, to which, however, *Sonsmith v. Pere Marquette R. Co.* (Mich.), 138 N. W. 347, 356, 360, runs counter,—yet these and others but settle that no discrimination which is palpably arbitrary and unreasonable will be sustained by the courts. But we get nearer to the question in hand by looking into the cases in which confessed discriminations have been sustained, and the general rules upon which courts proceed in dealing with differentiations made by the legislature.

a. As to the general rules applicable, we find that in *Gundling v. Chicago*, 177 U. S. 183, it is declared that regulations of a lawful trade or business are of very frequent occurrence, and that "what such regulations shall be, and to what

particular trade, business or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state." True, the same court holds, in cases like that of *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150 (and it is the holding of *Jolliffe v. Brown*, 14 Wash. 155), that acts imposing an attorney fee for non-payment of or delay in paying claims for damages to or overcharges on freight, stock killed, and the like, are void on the ground that consequences were attached to non-payment of debts of which a railroad was guilty, that were not attached when others were. The reason for this seeming conflict in decision is that in these last the police power was not involved. And the Supreme Court of the United States has more recently held that an attorney fee might validly be exacted for delay in making payment of loss due to setting fire, because such requirement is an exercise of the police power.

b. It is not fatal that the act does not in legal effect cover the entire field subject to such regulation (*Dutton v. Priest* [Fla.], 65 So. 282); or singles out a particularly hazardous employment and subjects it to burdens not placed on other extra-hazardous employments (*Cunningham v. Northwestern Imp. Co.* [Mont.], 119 Pac. 554); or that it is limited to employes engaged in extra-hazardous work (*State v. Clausen* [Wash.], 117 Pac. 1101). In *Cunningham's* case, *supra*, it is held not to be an arbitrary discrimination that the act makes no difference between employers who are careful and others who are or may be careless. It does not avoid the act that it makes differences in the measure of damages. *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26. An act as to closing openings in floors has been sustained, although it distinguished between buildings in cities and buildings in villages as to some requirements, and distinguished between private residences and other structures as to the strength of supports required for joists. *Chicago D. & C. Co. v. Fraley*, 33 Sup. Ct. Rep. 715. In *Field v. Barber Asphalt Pav. Co.*, 194

U. S. 618, there is sustained a statute which provides that a street improvement may not be made if resident owners protest, but fails to give like effect to protest on part of nonresident owners. In *City v. Sturges*, 32 Sup. Ct. Rep. 92, an act is upheld which imposed liability for damage to property caused by mob or riot, and charging cities therewith, although as to liability for like acts done in a village or incorporated town, the county, instead of the village or town, is made responsible. And in *Gentsch v. State*, 71 O. St. 151, a statute for keeping open polls which provided different hours, making the distinction rest on a population of more than 300,000, is held not to be class legislation, though there were but two cities of that size in the state—and we have affirmed the same, in effect.

In *Cargill Co. v. Minnesota*, 180 U. S. 452, a law was sustained which required a state license of owners of elevators on railway right of ways, and not of owners of elevators not so situated. As said in *Missouri Pac. R. Co. v. Mackey*, 8 Sup. Ct. Rep., at 1163, it is simply a question of legislative discretion whether the same liability shall be applied to carriers by canal and stage coaches and to persons using steam in manufactures.

c. When legislation proceeds under any express power, say, to regulate the removal of causes, the discretion in applying the power and in excepting from the application of the statute is of the widest. *McChesney v. Illinois Cent. R. Co.*, 197 Fed. 85, 86. And so of an exercise of the police power. *Dutton v. Priest* (Fla.), 65 So. 282. So there was sustained the singling out railroads for a prohibition against letting Johnson grass or Russian thistle go to seed. *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 269. And so of a law confining what shall constitute a certain misdemeanor to acts of women between the ages of 15 and 30. *People v. Coon*, 67 Hun. (N. Y.) 523, 525.

d. It is not controlling that some inequality may be occasioned. *Louisville & N. R. Co. v. Melton*, 218 U. S. 36;

Merchants & Mfrs. Bank v. Commonwealth, 17 Sup. Ct. Rep. 829; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205. And Mr. Justice Brewer said, in *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 106:

"Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

No rigid equality is required, and wide latitude by the courts is permitted in the discretion and wisdom of the legislature. *Hayes v. Missouri*, 120 U. S. 68; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237; *Orient Ins. Co. v. Daggs*, 172 U. S. 557; *Sonsmith's case* (Mich.), 138 N. W. 356, 360; *Dutton's case* (Fla.), 65 So. 282.

e. It suffices if the differentiation "is practicable,"—*Insurance Co. v. Daggs, supra*,—and if the classification and discrimination is "judicious"—*State v. Powers*, 38 O. St. 54, 63.

While not without limit, there are inhibited only "clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments." *Bell's Gap case, supra*. Laws exhibiting differentiations are not reviewable unless "palpably arbitrary" (*Insurance Co. v. Daggs, supra*); are "purely fanciful and arbitrary" (*Matheson v. Minneapolis St. R. Co.* [Minn.], 148 N. W. 71; wholly without a reasonable or practical basis (*Dutton's case* [Fla.], 65 So. 282); "so manifest as to leave no room for reasonable doubt" (*Sexton v. Newark Dist. Tel. Co.* [N. J.], 86 Atl. 451). The courts have no right to interfere unless the classification made is so clearly arbitrary as to be violative of constitutional rights (*Cunningham's case* [Mont.], 119 Pac. 554); may interfere only if it is arbitrary to unreasonableness and unjustly discriminative (*Dutton's case*, 65 So. 282, 283); or where it is the plainly evinced legislative purpose to make unjust discrimination, or a false and unnatural classification has been resorted to for the purpose of giving a special law

the appearance of a general one, with intent to evade some constitutional limitation (*Cincinnati St. R. Co. v. Horstman*, 72 O. St. 93, 107).

In *Jeffrey v. Blagg*, 35 Sup. Ct. Rep., at 169, speaking to a classification under which certain defenses were left those who employed less than five, and taken from those who employed more than five, the Supreme Court of the United States said:

"This court has many times affirmed the general proposition that it is not the purpose of the 14th Amendment in the equal protection clause to take from the states the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. *Lindsley v. Natural Carbonic Gas Co.*, 31 Sup. Ct. Rep. 337, and previous cases in this court cited on page 79. That a law may work hardship and inequality is not enough. Many valid laws, from the generality of their application, necessarily do that, and the legislature must be allowed a wide field of choice in determining the subject-matter of its laws, what shall come within them, and what shall be excluded."

In *Gundling's* case, 177 U. S. 183, the same court says:

"Unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."

It is an elementary principle in determining the constitutionality of a statute that any reasonable doubt must be solved in favor of the legislative action. *Gates v. Brooks*, 59 Iowa 510. The violation of the Constitution should be clear and apparent before the act may be declared void. *Reed v. Wright*, 2 G. Gr. 15. The power to set aside a law is not to be resorted to unless the case be clear, decisive and unavoidable.

Santo v. State, 2 Iowa 165, 208; *McCormick v. Rusch*, 15 Iowa 127. It must be a case of clear, plain and palpable conflict with the Constitution. *Central Iowa R. Co. v. Board of Supervisors*, 67 Iowa 199. Only when the conflict is so clear, palpable and plain as to leave no doubt of the invalidity of the statute in the judicial mind. *Morrison v. Springer*, 15 Iowa 304; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa 312. When the statute is clearly, palpably, plainly and beyond reasonable doubt in conflict with the Constitution. *Stewart v. Board of Supervisors*, 30 Iowa 9.

Surely, the excepting from the act said employes, and the claimed difference in consequences attaching respectively to rejection and acceptance by master and servant, are not so manifestly and palpably arbitrary, and such misuse of the conceded power to classify, as that we should hold the statute void on account of these differentiations.

III. Section 42 of the act provides that every employer, subject to its provisions, shall insure his liability thereunder in some organization approved by the State Department of

19. CONSTITUTIONAL LAW: due process: compelling insurance.

Insurance, and various provisions go into detail as to this and also supervision and regulation of taking and maintaining such insurance. Still other provisions afford methods

by which the insurance can be carried by mutual arrangement by the employer and employe, or under which the employer may carry his own risk; and there are various regulations and supervisions of these other arrangements for carrying insurance, for terminating such arrangements, and the like.

The act in these regards is challenged, first, in a loose way, for so interfering with the right to contract—more specifically because Section 45 denies to employers the right to

20. TAXATION: purpose of tax: compulsory insurance: police power.

elect what plan of insurance they will use; and lastly, again rather loosely, it is urged that the entire insurance scheme of the act operates as an unauthorized use of the taxing power—is, in effect, a tax levied upon the

employer to assure payment for injuries sustained by his employe.

It will be noticed that the condition precedent is that such insurance shall be maintained by "every employer, subject to the provisions of this act." (Sec. 42.) While this clearly shows that no employer is compelled to insure unless he has accepted, and thus become subject to, the act, we shall, for present purposes, deal with this point as though such employers as are named in the act were compelled thereby to perfect and maintain such insurance.

Concede, for the sake of argument, that this part of the statute works a taxation of the employer. Is there any fundamental objection to such a tax as this? It is undoubted that the taxing power may not be used as a subterfuge to accomplish that which is not legitimately for the taxing power; undoubted that its exercise, no matter in what form, can be sustained only where the exaction is, in the sense of the law, for a public use. As is not unusual, the difficulty is not in ascertaining the rule, but in applying it. Why have such statutes as this been upheld as not being violative of the due process clause, and upheld generally?

A compulsory insurance law to provide workmen's compensation by the method of insuring in a state fund has been sustained in the *Clausen* case (Wash.) 117 Pac. 1101, against the objection that it was violative of the due process clause of the Federal Constitution, and sustained as being a reasonable police regulation. What amounts to a compulsory tax, akin in principle to the taxation involved here, is upheld by the Supreme Court of the United States in *Noble's* case (Guaranty of Deposit Act), 31 Sup. Ct. Rep. 186, and followed in *Assaria St. Bank v. Dolley*, 31 Sup. Ct. Rep. 189, upholding compulsory taxation of the banks concerned. *Jensen v. Southern Pac. R. Co.*, the most recent pronouncement by the Court of Appeals of New York, 109 N. E. 600, 604, recognizes that the reasoning in the *Noble* case sustains what may be called taxation features of workmen's compensation acts; and the

court says that a compulsory scheme of insurance to secure injured workmen in hazardous employments and their dependents from becoming objects of charity "certainly promotes the public welfare as directly as does an insurance of bank depositors from loss."

An analysis of these decisions demonstrates that they proceed on the reasoning that the statute does not impose on the employer a liability to pay an employe or his dependents any sum of money whatsoever, but does require that he shall secure to all his employes compensation guaranteed by insurance—require that he do this under regulation by the state on penalty for failure to comply, a penalty imposed on the theory that he commits an unlawful act when he does that or omits that through which the employes and their dependents will suffer, and, so suffering, inflict an injury upon the state. They hold that compensation acts do not enforce individual liability growing out of contract, or liability for a tortious act or omission; that their basic aim is social justice; that they exercise a highly intelligent selfishness in recognizing that there is no ultimate advantage in obtaining products at too low rates on the fictitious basis that such rates include all the cost of the product, when, in truth, the selling price is below cost, because part of the cost is thrown upon the most helpless of the people, in the first instance, which "saving," and more, is ultimately thrown upon the general community, in expense of litigation over accidents, of caring for pauperized victims of the accidents, and in the indefinable, but none the less real and serious, damage to the state growing out of distress and pauperism thus permitted to exist. We so reach the satisfactory conclusion that the only inquiry we need to address ourselves to is whether the so-called taxation involved in the maintenance of insurance be—if a tax, or, though a tax, a tax for a public purpose—sustained by the police power; and we think the cases answer in the affirmative, and that independent thought sustains them.

2.

To paraphrase the inquiry, is such requirement a means of promoting the public welfare; is the premium to be paid an exaction for public use when exacted in order to make more certain that an injured employe shall receive the compensation provided by the legislature? That, in a sense, this is a provision for the benefit of the employe rather than one directly for the benefit of the public at large may be conceded. But does the concession present a case of improper exercise of the police power? True, it has been held that the taxing power may not be invoked to aid a private enterprise upon the ground that its establishment would be a benefit to the people of the community. *Loan Association v. Topeka*, 20 Wall. 655, 663, 664. *In re Justices* (Mass.), 30 N. E. 1142, declares it is not within the power of the legislature to give a city power to purchase fuel for sale to its citizens, although they may be indigent, in rigorous winters, and have great difficulty in obtaining fuel. True, also, the same authority has declared (*In re Municipal Fuel Plants*, 66 N. E. 25) that, if at any time it should be made to appear that conditions were such that fuel could not be obtained by private enterprise, the court might hold that the municipality was authorized to enter upon the business of conducting fuel yards for the same reasons which authorize one to acquire and maintain water, gas and light plants. Acts have been condemned which appropriated public money for seed grain, and loans to farmers whose crops have been destroyed by hail or storms in a given year (*Deering v. Peterson* [Minn.], 77 N. W. 568); and authorizing townships to issue bonds and use the proceeds to provide destitute citizens of those townships with provisions and with grain for seed and feed (*State v. Osawkee Township*, 14 Kans. 418). So of legislation authorizing a city to issue bonds in order to loan money to owners of buildings to enable them to rebuild property destroyed in the great Boston fire of 1872 (*Lowell v. City of Boston*, 111 Mass. 454); and a similar act

passed in South Carolina (*Feldman v. City Council of Charleston*, 23 S. C. 57 [55 Am. Rep. 6]); and legislation providing for a quarterly payment out of the state treasury to provide relief for worthy blind (*Auditor v. State* [Ohio], 78 N. E. 955); and an act raising taxes to provide treatment for inebriates at institutions devoted to their care and cure (*Wisconsin K. I. Co. v. Milwaukee County* [Wis.], 70 N. W. 68; *State v. Froehlich* [Wis.], 94 N. W. 50); and an inheritance tax imposed for the purpose of paying the expenses of deserving students at the state university (*State ex rel. Garth v. Switzler* [Mo.], 45 S. W. 245); and the use of public funds to erect a building for a Grand Army of the Republic Post (*Kingman v. City of Brockton* [Mass.], 26 N. E. 998); and a tax ordered after the close of the Civil War to pay bounties to soldiers who enlisted during that war (*Mead v. Inhabitants of Acton* [Mass.], 1 N. E. 413); and an act requiring the deduction of a certain percentage of the salaries paid to teachers in public schools for the creation of a pension fund (*State v. Kurtz*, 21 O. C. C. R. 261, and *State v. Hubbard*, 22 O. C. C. R. 252, 267, affirmed in 65 O. St. 574); and a provision that, under the so-called Torrens Registration Act, a system for the registration of land titles, the person first registering a parcel of land should pay a certain sum, based on the value of the land, into an insurance fund for the protection of land titles (*State v. Guilbert*, 56 O. St. 575). In *Louisville & N. R. Co. v. Baldwin* (Ala.), 5 So. 311, an act was avoided which imposed the expenses of examining employes as to color-blindness upon the railroad company who might employ such persons. In *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, the Supreme Court of the United States declared, on the other hand, that such charge against the company was proper. On the whole, however, it is clear that taxes may not be levied for a purely private use. In *re Justices* (Mass.), 30 N. E. 1142, 1144; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S., at 756.

3.

But when all is said, rules of law that such taxes are not sanctioned, and that certain instances of taxation were, therefore, unwarranted, and beyond the power of the legislature, do not settle whether some other attempt at taxation is or is not within the ban. The quarrel is not over the rule that the tax must be for a public use, but over whether its exercise in this case exacts a tax for other than public use. On this problem, ascertaining how far the courts may inquire into the character of the use for which the tax is intended, and of the cases wherein taxation has been sustained, will be found more helpful than the study of cases in which the right to tax has been denied. At the outset, we find the clearly established rule that the courts must not interfere unless the exercise of the police power is an arbitrary invasion of substantial private rights, by means of "illegal or palpably unjust hostile and oppressive exactions, burdens, discriminations or deprivations" (*Dutton v. Priest* [Fla.], 65 So. 282); that the legislature, being familiar with local conditions, is primarily the judge of the necessity of such enactments; and that the court should not interfere, no matter what its opinion of the wisdom or necessity of the act, unless the same "is unmistakably and palpably in excess of legislative powers, . . . and has no reasonable relation to the protection of the public health, safety or welfare."

In *Broadhead v. City of Milwaukee*, 19 Wis. 658, 686, it is said that:

"To justify the court in arresting the proceedings and in declaring the tax void, the absence of all possible public interest in the purposes for which the funds are raised must be so clear and palpable as to be perceptible by every mind at the first blush."

In *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 147, 174, it is declared that a tax law must be considered valid

unless it be for a purpose in which the community has no interest.

It is not a sufficient ground for the interposition of the judiciary that in a sense the tax is to be used for what is both a private and a public benefit; or that others than the taxpayer are benefited.

In *Noble State Bank v. Haskell*, 31 Sup. Ct. Rep. at 300, the levy and collection from every bank existing under state laws of an assessment based on deposits, for the purpose of creating a depositors' guarantee fund, saving harmless a depositor if any such bank becomes insolvent, is held to be for a public use, although, judged from the proximate effect of the taking, the use seems to be a private one. It is said, at pages 186, 187, to be a valid exercise of the police power; that such enactments are to be upheld where the state thinks the public welfare requires them; that such an assessment is not primarily even a private benefit, but tends to make the banking business safe, which is a benefit to the public, because resorting to a bank as a place to keep money is almost compulsory. To the same effect is *State S. & C. Bank v. Anderson* (Calif.), 132 Pac. 755.

The principle has been accepted early in holding that what was, in terms, a tax on owners of dogs to raise a fund for reimbursing the owners of sheep which were killed by dogs, was, in truth, a police regulation. That is the holding of *People v. Van Horn* (Mich.), 9 N. W. 246. And this decision has been followed in a line of cases collected in a note in 17 L. R. A. (N. S.) p. 855. A very interesting and valuable decision which sustains such dog tax is *McGlone v. Womack* (Ky.), 111 S. W. 688. It holds that the purpose of such tax is a public one, and the question of the impossibility of determining who is at fault is discussed as it would be in a workmen's compensation act, and the reasonable character of the tax is established, though it must be said that three justices dissented.

In the *Haskell* case, *supra*, at page 188, it was said that it

would seem there may be many cases of taxation in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume; at least, that this is so with reference to the right to exercise the police power in exacting such taxation, citing *Ohio Oil Co. v. State of Indiana*, 177 U. S. 190 (20 Sup. Ct. Rep. 576). In *County of Mobile v. Kimball*, 102 U. S. 691, as approved in *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, it was held that a provision for the issuing of bonds by a county could not be declared invalid, although it imposed upon one county the expense of an improvement in which the whole state was interested; and so of work done in a particular county for the benefit of the public, where the cost is cast upon the county instead of upon the whole state; that in cases where the interests of the public and of individuals are blended in any work or service imposed by law, it is a matter of legislative discretion whether the cost shall be thrown entirely upon the individuals or upon the state, or be apportioned between them. In the *Gibbes* case, *supra*, this doctrine is applied to opening, widening or improving streets where the owners of adjoining property are compelled to bear the expenses, or part of them, although the work is done chiefly for the benefit of the public; and to the draining of marsh lands, where the expense is usually thrown upon the owners of the property, though the public is directly interested in removing the causes of malaria; and to quarantine regulations for the protection of the public against the spread of disease, where the vessel examined is made to pay for all or part of the expense of examination; and to charging the railroad with the expense of compulsory examination of a railroad engineer to ascertain whether he is free from color-blindness.

In a word, a tax law must be considered valid unless it be for a purpose in which the community has *no* interest (*Sharpless* case, 21 Pa. St. 147, 174); or "if there be the least possibility that it will be promotive in any degree of the public

welfare'' (*Booth v. Town of Woodbury*, 32 Conn. 118, 128). This disposes of *Lawton v. Steele*, 152 U. S., at 137, in effect that it is not sufficient that the interests of many persons are served, but that it must be the interest of the public generally, as distinguished from those of a particular class.

4.

If a tax raised aids in a scheme to prevent the vast economic waste which arises from personal injury litigation, and if it be to the interest of the public to care for the victims of industrial accidents to the extent, at least, of making compensation sure and free from expense, then such tax is for the benefit of the public, though it be at the same time beneficial to a class of citizens. The inquiries to be answered in testing whether an enactment purporting to be for the promotion of the public good is fairly within the field of the police power, are, according to *State v. Redmon* (Wis.), 14 L. R. A. (N. S.) 229, well stated in Freund's *Police Power*, § 143, thus:

"Does a danger exist? Is it of sufficient magnitude? Does it concern the public? Does the proposed measure tend to remove it? Is the restraint or requirement in proportion to the danger? Is it possible to secure the object sought without impairing essential rights and principles?"

To this we are moved to add that the test is not whether these conditions do exist, but that the courts may not avoid such taxation unless it is palpable that the legislature had no right to assume that such conditions existed, and that being passed, that the legislature palpably exceeded its powers to deal with these conditions, if they do exist, or may reasonably have been held to exist.

We think the authorities and sound reasoning leave no room for doubt as to how we shall answer whether this was a justified exercise of the police power. That what the act does in this regard is a valid exercise of the police power is decided

in *Cunningham's* case (Mont.), 119 Pac. 554; *State v. Clausen* (Wash.), 117 Pac. 1102, 1103; and *Borgnis v. Falk* (Wis.), 133 N. W. 209. In the *Cunningham* case, *supra*, it is declared that this is so, notwithstanding the act operates to the direct benefit of the injured employe or his dependents, and not directly to that of the public generally. In *Cooley on Taxation* (3d Ed.), page 1125, it is said to be a valid exercise of the power, even though the act does not have the raising of revenue for its object; if it looks rather to the regulation of relative rights, privileges and duties as between individuals, to the conservation of order in the political society, and to the encouragement of industry. The same author says, at page 204:

"The support of paupers and the giving assistance to those who, by reason of age, infirmity or disability, are likely to become such, is, by the practice and the common consent of civilized countries, a public purpose." See *State v. Davidson* (Wis.), 88 N. W. 596 (90 N. W. 1067); *State v. Cassidy*, 22 Minn. 312; *Charlotte, C. & A. R. Co. v. Gibbes*, 12 Sup. Ct. Rep. 255; *Consolidated Coal Co. v. People of Illinois*, 22 Sup. Ct. Rep. 616; *People v. Squire*, 12 Sup. Ct. Rep. 880.

In re Shattuck (N. Y.), 86 N. E. 455, bases its decision upon the statement: "In view of the quite universal rule that charitable uses and public uses are synonymous;" and in *Trustees of Firemen's Fund v. Roome*, 93 N. Y. 313, it is held that a particular business could be taxed to support burdens of the government related to such business, and that the support of volunteer firemen disabled by accident, disability, or old age, and their families, is a public purpose.

In principle, the bank deposit guaranty decision is a holding that the taking justified by that statute is a proper exercise of the police power. It does not have a provision more in the public interest than that involved in this case, and the mutual benefits to the parties immediately concerned were not as direct. A compulsory scheme of insurance to secure injured workmen in hazardous employments, and their dependents,

from becoming objects of charity, certainly promotes the public welfare as directly as does an insurance of bank depositors from loss.

And in *Adler v. Whitbeck*, 44 O. St., at 565, it is held that the inevitable accidents and personal injuries resultant from modern industrialism are a source of burden to the general public beyond those of the pursuits of men in general, and it is within the legislative power to tax the industries responsible for that added public burden.

Applying the doctrine of the bank deposit guaranty decision, we find that in this case the mutual benefits are direct. Granted that employers are compelled to insure, and that there is in that sense a taking, they insure themselves and their employes from loss, not others. The payment of the required premium exempts them from further liability. The theoretical taking, no doubt, disappears in practical experience. As a matter of fact, every industrial concern, except the very large ones which insure themselves, have, for some time, been forced by conditions, not by law, to carry accident indemnity insurance. The difference is that a relatively small part of the sums thus paid actually reached injured workmen or their dependents.

5.

We do not find the argument persuasive that the act has induced insurance associations to combine and to place the rate of insurance at prohibitive figures. There is no evidence in the record that this is so, notwithstanding that, in argument, reference is made to the biennial report of the Iowa Industrial Commission, speaking to Iowa coal mines. If proven, it would not be controlling; because, first, if the rates are made prohibitive, the employer will reject the act, and there will be no insurance taken, which will automatically lead extortioners to mend their way, to avoid killing the goose that lays golden eggs; second, there are more direct and better methods of dealing with combinations such as are here charged to exist, than

by declaring an otherwise valid act void, because it requires the employer to insure his liability.

We hold that the insurance features of the act do not invalidate it.

IV. If the employer and the employe reach an agreement in regard to the compensation under this act, a memorandum thereof shall be filed with the commissioner; and unless he, within twenty days, notify of his disapproval, the agreement stands approved, and is enforceable for all purposes under the provisions of the act. (Section 26.)

21. CONSTITUTIONAL LAW: distribution of powers: delegation of judicial power: workmen's compensation act.

If the parties in interest fail to reach an agreement in regard to compensation under the act, either party may notify the commissioner, who thereupon forms a committee of arbitration of three, of which the commissioner is one, and is chairman. The other two shall be named respectively by the two parties. If a vacancy occurs, it shall be filled by the party whose representative is unable to act. (Sec. 27.) Then come provisions as to the oath to be administered the arbitrators, and other provisions as to filling vacancies. (Secs. 28, 29.)

It is next provided that the committee shall make such inquiries and investigations as it shall deem necessary, where the inquiry shall be held, and that the decision of the committee, together with a statement of evidence submitted before it, its findings of fact, rulings of law, and any other matters pertinent to questions arising before it, shall be filed with the commissioner. Unless a claim for a review is filed by either party within five days, the decision becomes enforceable under the provisions of the act. (Sec. 30.) The commissioner has power to subpoena, administer oaths, examine such books and records of the parties to a proceeding or investigation as relate to questions in dispute or under investigation, and may make rules and regulations, not inconsistent with the act, for carrying out its provisions. (Sec. 25.)

If a claim for review is filed, the commissioner shall hear

the parties, and may hear evidence in regard to any or all matters pertinent thereto, and may revise the decision of the committee in whole or in part, or refer the matter back to it for further findings of fact, and he shall file its decision with the record of the proceedings, and notify the parties. No party shall, as a matter of right, be entitled to a second hearing upon any question of fact. (Sec. 33.)

Any party in interest may present certified copy of an order of the commissioner or decision of the committee as to which no claim for review is made, within the time allowed for such presentation, or present a memorandum of agreement approved by the commissioner, and all papers in connection with same, to the district court, whereupon said court shall render decree in accordance therewith, and notify the parties. Such decree shall have the same effect, and in all proceedings in relation thereto shall thereafter be the same, as though rendered in a suit duly heard and determined by said court. But there shall be no appeal from said decree upon questions of fact; nor where the decree is based on an order or decision of the commissioner which has not been presented to the court within ten days after the commissioner gives notice of its filing. Upon the presentation to the court of a certified copy of a decision of the commissioner, ending, diminishing or increasing a weekly payment under the provisions of the act, the court shall revoke or modify the decree to conform to such decision. (Sec. 34.)

Any payment to be made under the act may be reviewed by the commissioner, at the request of either of the parties, and on such review it may be ended, diminished or increased, subject to the maximum or minimum amounts provided for in the act, if the commissioner finds that the condition of the employe warrants such action. (Sec. 35.)

Process and procedure under the act shall be as summary as reasonably may be. (Sec. 25.)

It is interposed that these work an improper delegation of judicial power, and a denial of judicial hearing; that the

courts are compelled to enter judgment upon the award without further hearing; that there is no provision for appeal from the judgment on the award except the limited one permitted by the act; that the judgment must be modified by the court, if modified by the commissioner, and that this works a denial of due process of law, and taking of property without due process of law.

2.

It is not wholly clear that here there is a delegation of judicial power. It might perhaps as well be claimed that what has really been delegated is not judicial power, but power by award and resulting entry of decree to apply the measure of damages created by legislative act,—a delegation of legislative rather than of judicial power; and Chief Justice Marshall said, in *Wayman v. Southhard*, 10 Wheat. 1, that Congress can delegate "what powers it might rightfully exercise itself," and grants of legislative power to subordinate municipal corporations and administrative boards have uniformly been sustained. See *Martin v. Witherspoon*, 135 Mass. 175. According to *Sabre v. Rutland R. Co.* (Vt.), 85 Atl. 694, such acts confer the power upon investigation to apply the general provisions of law to particular circumstances and situations, and may validly leave much of detail to the discretion of a commission; though they may in a sense clothe an administrative body with quasi judicial functions in some respects, this is authorized by the police power, and confers power merely to determine facts upon which existing law shall operate—which is a conferring of auxiliary or subordinate legislative powers. The act takes away the cause of action on the one hand, and the ground of defense on the other, and merges both in a statutory indemnity, fixed and certain. *State v. Clausen* (Wash.), 37 L. R. A. (N. S.) 487.

In *State v. Superior Court* (Wash.), 120 Pac. 861, the public utilities act conferring certain powers on the public service commission is said to be valid against objection that

it is a usurpation of legislative or judicial functions, because the power to be exercised by the commission consists simply in the ascertainment of facts on which the general rule of the legislature and of the Constitution that reasonable rates shall be adopted, operates.

Others of the authorities proceed on the reasoning that the commission and arbitration boards are not courts; that the hearing before them is not the hearing the denial of which is inhibited by the due process clause; that there is no adversative proceeding; that such bodies have, at most, only quasi judicial function; that they are an administrative body or arm of government which, in the course of its administration of a law, are empowered to ascertain some questions of fact, and apply that law thereto; that such are not thereby vested with judicial power in the constitutional sense; that such are executive tribunals, charged with the duty of administering an act of legislature, and of applying the terms of that act to specific cases under the sanction of an agreement to which all persons affected by that act are parties.

3.

But assume that the delegation is one of judicial powers. While, if the parties are left wholly free on whether to reject or accept this arbitration and resulting court orders, it is, perhaps, not strictly necessary to determine whether enforced submission to said procedure would be valid, we hold that, even if submission be compulsory, there is here no unwarranted delegation. It does not at all follow from pronouncements that judicial power may not be delegated, that none but duly constituted constitutional courts may exercise judicial power.

It is said in *State ex rel. Atty. Gen. v. Hawkins*, 44 O. St. 98:

“What is judicial power cannot be brought within the ring-fence of a definition. It is undoubtedly power to hear and determine; but this is not peculiar to the judicial office. Many

22. CONSTITUTIONAL LAW: distribution of powers: workmen's compensation act: judicial power of commissioner and arbitrators.

of the acts of administrative and executive officers involve the exercise of the same power. Boards for the equalization of taxes, of public works, of county commissioners, township trustees, judges of election, viewers of roads, all, in one form or another, hear and determine questions in the exercise of their functions, more or less directly affecting private, as well as public rights. . . . 'The authority to ascertain facts and to apply the law to facts when ascertained, appertains as well to the other departments of the government as to the judiciary.' "

While, says *In re Stockyards Company*, 149 Iowa 5, 11, it is, of course, true that the power to tax, that is, the power to provide the method of taxation and specify the subject-matter to be taxed, is legislative, the determination of questions of fact as to whether particular property comes within the statutory description and particular persons are persons required to pay taxes on property, as well as the determination of the correctness of the method pursued in any particular case, may well be, and often is, strictly judicial. It holds that, so far as the determination involves the interpretation of the law and the decision of issues of fact on evidence submitted in accordance with the rules of law, it is necessarily judicial in its nature, and that such questions may be left to special tribunals or officers exercising quasi judicial functions, or provision may be made for their determination by courts of law.

We said, in *Denny's* case, 143 Iowa, at 474:

"Of course, the legislature may provide for a review in the courts of the action of a tribunal, legislative in character, which it has required to determine issues of a judicial nature."

In *Sabre v. Rutland R. Co.* (Vt.) 85 Atl. 694, there is sustained an act creating a Board of Railroad Commissioners, and held that it does not conflict with the constitutional provisions as to the distribution of the powers of government, since that provision does not require an absolute separation of functions, but permits those of an administrative office or body to be, to a large extent, judicial and legislative in character; and see *In re Stockyards Company*, *supra*.

In *Cunningham's* case (Mont.), 119 Pac. 554, a miner's compensation act is upheld which provides a summary method for the disposition of claims filed under the law, and declared that same is not unconstitutional as conferring judicial power on the state auditor having charge thereof.

In *State v. Mountain Timber Co.* (Wash.), 135 Pac. 646, it is held that, as it was the fundamental idea of the industrial insurance act to provide more certain, speedy and adequate compensation for injured employes, there is, therefore, a valid exercise of the police power, and that the provision for its execution by the industrial insurance commission, without the intervention of the courts, is valid, because necessary to carry the idea into effect, even though it might be considered a delegation of judicial power to the commission, and in some cases deny right of trial by jury, contrary to the state Constitution.

4.

The following have been held to be a warranted delegation of judicial power: To the commissioner of internal revenue, power to designate marks, brands and stamps required by the act defining butter and imposing a tax on the manufacture of oleomargarine (*In re Kollock*, 17 Sup. Ct. Rep. 444); an act which permits a hearing by the secretary of war on whether a bridge is an unreasonable obstruction to navigation, and authorizes him to require changes that will, in his judgment, render navigation reasonably safe and unobstructed (*Union Bridge Co. v. United States*, 27 Sup. Ct. Rep. 367; *President, etc., Bridge Co. v. United States*, 30 Sup. Ct. Rep. 356); one authorizing a public service commission to investigate the necessity of gates at a crossing near a station used by a large number of persons in going to and from a station, and if it found it dangerous, to require the erection of gates (*Sabre v. Rutland R. Co.* [Vt.], 85 Atl. 694); one authorizing the superintendent of banks to take possession of the property

and business of a bank and retain same until it resumes business or its affairs shall be liquidated, if he believes that the bank is unsafe (*State Sav. & Com. Bank v. Anderson* [Cal.], 132 Pac. 755); a statute requiring the governor and council to order that an outward bound vessel, liable to pilotage if inward bound, shall be held to pay pilotage to the pilot offering his services, whether such services are accepted or not (*Martin's case*, 135 Mass. 175); a provision of a medical practice act authorizing the medical board to refuse or revoke certificates of qualification for certain causes, and providing for an appeal to the governor and attorney general (*France v. State*, 57 O. St. 1). The act at bar can scarcely be claimed to come under the ban, or within the rule of cases like *Board of Education v. State*, 51 O. St. 531, which considered an act of the legislature that undertook to determine that one A. C. Lindsay had a claim against the board of education of a certain township and county, which act directed the board of education to levy a tax for the purpose of paying this claim. Nor is it within *State v. Guilbert*, 56 O. St. 575, wherein the Torrens Registration Act was held invalid because it gave the recorder power: (1) to take proof after notice on whether a mortgage had been discharged, and after a hearing to enter a discharge upon the register; (2) on proof and hearing to make an entry that a lien claimed to be prior had become inoperative in law, by reason of limitation of time; (3) to correct memorials made or issued by mistake, except in cases wherein superior rights had intervened. It is held that, so, a ministerial officer is empowered to apply rules of evidence to the ascertainment of disputed facts, to interpret and apply the statute of limitations, to decide upon law and fact whether mistake has occurred, and who has superior intervening rights against such mistake; and that this is an unwarranted delegation of judicial power, even though appeal is provided.

V. Contracts by which the parties undertake to deprive themselves *in toto* of the right to resort to the courts to settle

controversies between them, in which are stipulated away all the rights of each or either to resort to the tribunals created by law, have been universally condemned. See *Wood v. Humphrey*, 114 Mass. 185; *Pearl v. Harris*, 121 Mass. 390; *Barron v. Burnside*, 7 Sup. Ct. Rep., at 931, 935.

23. CONSTITUTIONAL LAW :
distribution of
powers : total
ouster of
courts.

Appellant contends that the act violates this rule.

If we assume that the statute would be void if it operated to oust the courts of all jurisdiction to try controversies between employer and employe, it is an immaterial concession in the cases where the act is rejected. For, when rejected, the courts are not ousted of jurisdiction *in toto*; and, as we view it, not deprived of it at all. Where the act is rejected, the full dispute between the parties is still submitted by ordinary proceedings, and tried in the usual way. True, some mere rules of procedure are changed, some defenses are eliminated, and there is some change in burden of proof. Even if it be assumed that these changes are unauthorized, the objection is not sustained that, on rejection of the act, the courts no longer have jurisdiction to try suits for the injury of an employe.

2.

A somewhat more difficult question arises when the provisions of the act are accepted. In that case, if the parties cannot come to an agreement, compensation fixed by statute schedule is awarded by arbitration provided for in the act. In a sense, then, the acceptance of the statute operates to take from the courts so much of the controversy as is determined by the applying of the statute schedules through the agency of the statute arbitrators. Before we reach the question whether, if this constitute a total ouster of the jurisdiction of the courts, it would invalidate the act, we, of course, have to determine whether such total ouster is so effected. We are forced to deal with this question as one of first impression, because no decision that sustains the Compensation Act of other states is applicable. The Washington act and that of

Massachusetts reserve recourse to the courts and full judicial review. In *Sabre's* case (Vt.), 85 Atl. 694, 695, a delegation is sustained because in the end the matter may get to the Supreme Court and have full review. *Borgnis v. Falk Co.* (Wis.), 133 N. W. 209, sustains the Wisconsin act with a holding that there is review if the act be without power, or fraudulent; that if the board act without or in excess of its jurisdiction, there may be action in court to set aside the award, and that this may also be done if its findings of fact are not supported by the evidence. Our act has no such reservations, in terms, and, therefore, these decisions afford us no light.

3.

It does not constitute an agreement for complete ouster of the jurisdiction of the courts to provide by contract for the arbitration of special matters, such as agreement concerning the amount of loss due under an insurance policy, an agreement how some facts shall be fixed, and leaving ultimate liability or nonliability to be settled by the courts. Certain facts may be fixed by a person selected by contract for that purpose, so long as the ultimate question at issue may still be litigated in the courts. *Supreme Council v. Forsinger*, 125 Ind. 52; *Whitney v. National Mas. Accident Assn.*, 52 Minn. 378; *Insurance Co. v. Morse*, 20 Wallace 445; *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 55; *Mentz v. Armenia Fire Ins. Co.*, 79 Pa. St. 478; *Reed v. Washington F. & M. Ins. Co.*, 138 Mass. 572; *Fox v. Masonic Frat. Accident Assn.*, 96 Wis. 390, 394, 395.

The following cases also throw some light on the question: *Guaranty T. & S. D. Co. v. Green C. S. & M. R. Co.*, 139 U. S. 137; *Gittings v. Baker*, 2 O. St. 21; *Conner v. Drake*, 1 O. St. 166; *Kill v. Hollister*, 1 Wilson (Eng.) 129.

Contracts which provide that the value of certain property, and other like matters, shall be determined by a certain person therein named, and that his decision shall be final, are

usually upheld as lawful, on the ground that they do not oust the courts of their jurisdiction over the subject matter, but only provide a safe and speedy manner of fixing definitely some fact which is usually of a complex and difficult nature, and one that would not be easy to establish by evidence. And such fact, when ascertained and fixed by the person, and in the manner provided by the terms of the contract, is established between the parties in the absence of fraud or manifest mistake; but the parties are at liberty, after so fixing such fact, to go into court and litigate such differences as may still exist between them. See *Easton v. Pennsylvania & O. Canal Co.*, 13 Ohio 81; *Mansfield & S. City R. Co. v. Veeder*, 17 Ohio 385; *Mundy v. Louisville & N. R. Co.*, 67 Fed. Rep. 633; *Kane v. Stone Co.*, 39 O. St. 1; *North Leb. R. Co. v. McGrann*, 33 Pa. St. 530 (75 Am. Dec. 624); *Faunce v. Burke*, 16 Pa. St. 469 (55 Am. Dec. 519); *Monongahela Nav. Co. v. Fenlon*, 4 Watts & Sergeant (Pa.) 205; *Hamilton v. Liverpool, L. & G. Ins. Co.*, 136 U. S. 242.

Chapter 14, Title XXI, of the Code of 1897 provides that all controversies which might be the subject of a civil action may be submitted to the decision of one or more arbitrators, as by statute provided; and the submission to arbitrators may be of particular matters or demands, or of all demands which one party has against the other, or of mutual demands; and it cannot be revoked except on mutual consent. Code Section. 4395 enacts that awards by arbitrators who have been chosen without complying with the provisions of the chapter shall, nevertheless, be valid and binding on the parties thereto as is any other contract, and may be impeached only for fraud or mistake; and even as the award under the compensation act can be made finally effective only by decree of court, so the award of nonstatutory arbitrators can be enforced only by an action. We are not aware it has ever been claimed that such arbitration statutes are void for ousting the courts of jurisdiction, or for any other reason—and this though they provide for submission of the entire dispute by the parties to

arbitration, an extent to which, as will presently be seen, the compensation act does not go.

It has provisions that indicate that it is not intended, literally, at least, to give the statutory arbitrators all the powers that courts have. For the district court is empowered to enforce, by proper proceedings, the provisions of the section relating to the attendance and testimony of witnesses, and the examination of books and records. (Sec. 25.) And provision is made for cases whereby the judge, on notice, may commute future payments to a lump sum, restricted in amount by the statute, and upon payment there shall be a discharge of the employer of all future liability on account of the injury or death, and he be entitled to a duly executed release, upon filing which, the liability of the employer under any agreement, award, finding or judgment shall be discharged of record. (Sec. 15.)

So far as specific delegation goes, the arbitration committee can do no more than to find that the employe should have compensation under some item of the statute schedule; and the commissioner may, on investigation, make a finding that an award thus made shall be modified or terminated. It is manifest that this does not, in terms, deprive the courts of all jurisdiction in the premises.

The very basis of power to award compensation under the act is that its provisions must first be accepted; that the claimant must be an employe; that he must have sustained personal injuries; that they must have arisen out of and in course of the employment; and that the compensation shall be at rates fixed by the statute. By the terms of Section 10, payment of compensation as per schedule is to be made if employer and employe have accepted the act; and under Section 27, the arbitration committee is formed and proceeds, not because there is a dispute or the material for a lawsuit between employer and employe, but if these fail to reach an agreement "in regard to compensation under this act."

It is significant, too, that appeal is provided from the

decree enforcing the award, on which all save pure questions of fact may be reviewed. For all practical purposes, the rule prevailing in this court, on the law side—for that matter, the language of the grant in the Constitution—take from us the power to pass upon pure questions of fact. The elimination of that power is certainly not the taking of power to review, *in toto*. We hold that, though the act does not, in terms, provide for judicial review, except by said appeal, the statute does not take from the courts all jurisdiction in the premises. Arguing for the validity of the Ohio Compensation Act, the attorney general of that state concedes that if the board allowed nothing, or less than the compensation fixed by statute, court review remains, and that, perhaps, the courts may inquire whether the injury arose in the course of the employment or was self-inflicted.

Sabre's case (Vt.), 85 Atl. 694, 695, holds that, as the Constitution provides that courts shall be open for trial of all cases proper for their cognizance, therefore the courts, regardless of statute, may determine whether the board created has gone beyond the powers granted it. We are in no doubt that the very structure of the law of the land and the inherent power of the courts would enable them to interfere, if what we have defined to be the jurisdiction conferred upon the arbitration committee were by it exceeded; that they could inquire whether the act was being enforced against one who had rejected it, whether the claiming employe was an employe, whether he was injured at all, whether his injury was one arising out of such employment, whether it was due to intoxication of the servant, or self-inflicted,—or, acceptance being conceded, into whether an award different from the statute schedules had been made, into whether the award was tainted with fraud on part of the prevailing party or of the arbitration committee, and into whether that body attempted judicial functions, in violation of or not granted by the act.

All of which establishes that the statute works no complete ouster of jurisdiction—the only ouster which is condemned.

The utmost it does is to provide administrative machinery for applying rates of compensation fixed by the legislature, as between parties who have agreed to have the amount of compensation merely, thus determined. The effect of statutes, never challenged so far as we are advised, which limit recovery for negligence causing death, is to compel the courts to do what here is done by the arbitrators.

4.

That statute sanction of agreements which do divest the courts of all jurisdiction to settle disputes between the contracting parties would nullify such statute is not at all determined by the cases that condemn such agree-

24. CONSTITUTIONAL LAW :
distribution of
powers : judi-
cial powers :
right of legis-
lature to dele-
gate.

ment. It is one thing that a particular contract is void because the law disapproves it, quite another, that a law is void because it approves rather than disapproves such contract. Whether such statute is valid must

depend upon what ground contracts to oust the court of jurisdiction have been held void. If avoided because against public policy—and the avoidance has been put on that ground (see *Fox v. Accident Association*, 96 Wis. 390, 394, 395)—then contracts approved by the legislature are valid against that objection. Since statutes not inhibited by the Constitution bindingly declare that what they enact is public policy, a contract expressly authorized by such statute cannot be nullified for being against public policy. Of course, the legislature cannot validate such contract if the Constitution puts all exercise of all judicial powers in the courts; nor any contract that ousts the courts of such jurisdiction as the fundamental law gives to the courts, exclusively.

The true scope of the inquiry is, then, whether our Constitution prevents the delegation of judicial powers by statute—paraphrased, inhibits statutory approval of such delegation by contract.

The provisions of our fundamental law that can be in the least applicable here are the following:

“The judicial power shall be vested in a Supreme Court, district court, and such . . . inferior courts as the general assembly may from time to time establish.” Art. 5, Sec. 1.

If this were all, it might be claimed that this vests all judicial power or anything that can be claimed to savor of it exclusively in said courts, and that, therefore, any contract which puts judicial power in any aspect or of any degree elsewhere than in said courts cannot, therefore, be sanctioned by the legislature, nor upheld.

The duty of a court to give a statute such construction, if possible, as will maintain it, rather than one which will render it unconstitutional—*Santo v. State*, 2 Iowa, at 208; *State v. County Judge*, 2 Iowa 280; *Duncombe v. Prindle*, 12 Iowa 1; *Iowa Homestead Co. v. Webster County*, 21 Iowa 221—cannot be well performed unless the Constitution, too, be construed with a view to holding, if in reason possible, that a statute has not violated it. At the least, to arrive at the meaning of words used in a section of the Constitution, interpretation should consider sections preceding and following it having reference to the same subject-matter, unless the words to be construed have such clear and express meaning that there can be but one conclusion as to what was meant. *Allen v. Clayton*, 63 Iowa 11. Construing, then, with consideration of all that is said on the subject, we find, in Section 4 of Article 5, what shows that it was not intended, literally, to keep all judicial power in the Supreme Court; because this latter provides what are clearly limitations, to wit, that the Supreme Court shall have (1) appellate jurisdiction in cases of chancery and in no others, (2) and shall constitute a court for the correction of errors at law, “under such restrictions as the general assembly may by law prescribe.” Clearly, this makes Section 1 of the article less than a literal grant of exclusive power, because it not only specifies certain powers when, if there were a grant of

all power, no specification would be necessary, but expressly says that even the given judicial power may be restricted by the legislature. Sec. 6, Art. 5, provides that the District Court has "jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law." This, too, indicates that no unlimited exclusive possession of the judicial power is intended.

Our investigation has failed to find a case in which contracts unduly restrictive of the powers of courts have been avoided on the ground that their making was inhibited by a Constitution. And every sanction we have given to any delegation of judicial power to tribunals other than duly constituted judicial tribunals is, of necessity, an interpretation that our Constitution does not prohibit all delegations of such powers. If our fundamental law puts the exercise of all judicial power in the constitutional courts, we should have held that any delegation of such power by the legislature is an unconstitutional enactment. Instead, we have sustained many such, and, additional to the instances heretofore referred to, we hold, in *O'Brien v. Barr*, 83 Iowa 51, that it is constitutional to vest in the executive council the authority to determine in which of the penitentiaries a convict shall be confined; and, in *State v. Mason City & Ft. D. R. Co.*, 85 Iowa 516, that, though the board of railroad commissioners may not be a court, it may still be given jurisdiction to investigate and determine by prescribed rules and judicial inquiry questions submitted to it under statute authority.

It is the holding of *In re Assessment of Stock Yards Co.*, 149 Iowa 5, 10, that the delegation of judicial powers to administrative boards is not a void act because in contravention of Article 3, Section 1, Constitution, which provides that the powers of government of the state are divided into three departments, legislative, executive and judicial, and that no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function apper-

taining to either of the others, except as by the Constitution expressly directed or permitted.

We conclude that the act is not invalid because of effectuating any undue abstraction of the powers of courts.

VI. There is a general challenge that, if the employer rejects the provisions of the act, he is deprived of certain defenses, and it is put epigrammatically that he is deprived of practically all defense if he insists upon his constitutional rights to trial by jury under due process of law. It is advisable to be more temperate in determination than is this indulgence in advocacy.

25. MASTER AND
SERVANT:
workmen's
compensation
act: non-neg-
ligence of em-
ployer.

It is complained that the act denies to defendant the right to show that the injury complained of was caused by the negligence of the plaintiff. It does enact that the only negligence of the plaintiff which is available as complete defense is negligence which is self-inflicted or injury which is the result of intoxication. While this is all of the negligence of the plaintiff which so operates, we have held herein that the defendant is left at liberty to prove that, either by reason of the negligence of the plaintiff or for any other reason, the defendant is wholly free from fault. To be sure, under the act it is presumed that the proximate injury was the direct result of negligence on part of the employer, and upon him is the burden of proof to rebut this presumption, and to show affirmatively that no negligence of his is at fault for the injury.

It was never claimed that the Constitution was violated by the rule that the employe had the burden of proving that the master was to blame for his injury, and thus creating a presumption that the injury was not due to the fault of the employer. We are unable to see why the converse of the rule does violate the Constitution. Rules as to such presumptions and as to burden of proof are court-made, and can be changed or abrogated by the legislature.

26. MASTER AND
SERVANT: bur-
den of proof:
statutory
changes: con-
stitutionality.

If the courts could place the burden as it was before the

act, it is manifest that the legislature may abolish the court rule and substitute for it one reversing the former rule; and acts that work this change or abrogation come within the words of Mr. Justice Field, quoted in *Magoun v. Illinois T. & S. Bk.*, 170 U. S. 283, 293:

"It is hardly necessary to say that hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity."

In *Mobile, J. & K. C. R. Co. v. Turnipseed*, 31 Sup. Ct. Rep. 136, there is sustained a Mississippi statute under which, in actions against railway companies for damage done to persons or property, proof that the injury was inflicted by the running of locomotives or cars is made prima-facie evidence of negligence.

Cases like that of *Byers v. Meridian Ptg. Co.*, 84 O. St. 408, do not militate against this. It holds that the presumption of malice arising from the publication of libel is not one as to a mere matter of procedure, but is substantive law; and that, as the legislature cannot take away rights which it did not give, it may not ordain that this presumption is rebutted if the publisher of the libel retract.

2.

Contributory negligence, in the sense that, the employer and employe being both negligent, the employe will be defeated, no matter how small was his part in the total of the two negligences, has been taken away.

27. MASTER AND
SERVANT:
workmen's
compensation
act: abolition
of defenses:
constitutional
law.

But it will be found that this act has, in reality, added to the defense of contributory negligence rather than subtracted from it, though not by comparison with what the law of contributory negligence once was. If it were not for this act, all contributory negligence would be available in mitigation only. See Sec. 3593-a of the Supplemental Supplement to the Code of 1915, which is in no way

challenged. By reason of the compensation statute, there is the right so to plead in mitigation, plus the right to plead some contributory negligences in bar.

And if the act is accepted, Section 2 provides that no compensation under the act shall be allowed for any injury caused by the employe's wilful intention to injure himself, or to wilfully injure another; nor if the injury is sustained where intoxication of the employe was the proximate cause of the injury.

We think the *Jeffrey* case, 35 Sup. Ct. Rep. 167, is at least authority for the proposition that abolishing such defenses as contributory negligence, assumed risk and the negligence of fellow servants only, where the employer, being free to accept or reject, rejects, violates no constitutional rights.

3.

Taking away the defense that the injury is due to the negligence of a fellow servant, which is done by the act, is not objectionable as illegal classification, nor in any way violative of constitutional rights. *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205; *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35; *Watson v. St. Louis, I. M. & S. R. Co.*, 169 Fed. 942.

4.

As to the elimination by the act of various defenses resting on risks assumed by the employe, the taking of such defenses has been generally held to be within the power of the legislature. See *Missouri, K. & T. R. Co. v. Bailey* (Tex.), 115 S. W. 601; *El Paso & S. W. R. Co. v. Alexander* (Tex.), 117 S. W. 927.

It has been said of the defenses of assumed risk, and that the injury was the act of a fellow servant, that, having been evolved by the courts, they may properly be abrogated by the legislature. *Borgnis'* case (Wis.), 133 N. W. 209; *Jensen's* case (N. Y.), 109 N. E. 600, 604. And the Supreme Court of the United States has held, in *Mondou v. New York, N. H. &*

H. R. R. Co., 32 Sup. Ct. Rep. 169, that such rules as this are common-law rules. and no one has a vested interest in such rules. See also *State ex rel. Yapple v. Creamer* (Ohio), 97 N. E. 602, 606, left column, and *In re Opinion of Justices* (Mass.), *supra*, and *State v. Clausen* (Wash.), *supra*.

5.

It is urged that trial by jury is denied of all issues except the amount of damages, and conceded that, as to the latter, the defendant waived trial by jury. It is urged that such trial

is denied without a repeal of Code Sec. 3650,

28. CONSTITUTIONAL LAW : that issues of fact in an ordinary action must
jury trial : de- be tried by jury unless the same is waived.
denial of right :
workmen's
compensation
act.

We hold on this appeal that the statute did not deprive the appellant of the right

to a trial by jury in cases where, as here, he rejects the compensation statute, and that the denial is an error in interpretation, rather than obedience to legislative action. Without reference to the constitutional aspects of denying jury trial, the statute cannot be unconstitutional for denying trial by jury if it does not deny such trial.

It is true that the statute accomplishes giving the jury less to do than formerly, and changes the character of its work. It can no longer pass upon whether the plaintiff should not be wholly defeated because guilty of some degree of negligence contributing to the injury complained of, and can defeat the plaintiff only if the contribution is by self-infliction, or by negligence due to intoxication. Other contributions will get to it only on a plea in mitigation. The jury will no longer consider whether the plaintiff should be defeated because the evidence shows he assumed the risk of being injured as he was; will not have the question whether there must be a failure to recover because the injury was due to the negligence of a fellow servant. It will not have the question whether the servant has proven that his injury is due to the negligence of the master, and will begin its inquiries by assuming the master was

thus negligent, and next consider whether the employer has proven, notwithstanding this presumption, that he is wholly free from fault. It is self-evident that none of this denies trial by jury, but merely changes the rules under which such trial shall proceed.

Passing abstractions and general discussions, and coming to the question whether the act is invalid because it denies the right to trial by jury in proceedings to administer the act between those who have accepted it, we find it

29. JURY: jury
trial: denial:
workmen's
compensation
act: constitu-
tional law.

universally held that in such case it is not a valid objection that jury trial is not provided for. *Sexton v. Newark Dist. Tel. Co.* (N. J.),

86 Atl. 451; *State v. Clausen* (Wash.), *supra*;

Jensen's case (N. Y.), 109 N. E. at 603, 604; *Debeikis' case* (Ill.), *supra*; *Mellen Lumber Co. v. Industrial Commission* (Wis.), 142 N. W. 187; *Kentucky St. Jour. Co. v. Workmen's Comp. Bd.* (Ky.), 170 S. W. 1166.

The right to jury trial can be waived. Our own statute (Code Sec. 3650) provides, in terms, that the right exists only if it be not waived. It may be conceded that the cases hold, as appellant claims, that the waiver of trial by jury and by due process of law must be by voluntary assent, but it does not follow that constitutional guarantees must be "expressly" waived by the party thereby affected.

Proceeding upon this premise, the authorities hold that, whenever two agree to have their difficulties adjusted by a method which excludes trial by jury, they thereby waive the right to such trial; that the right to such trial is waived by electing to come within the act; that such acts take away the cause of action on the one hand and the ground of defense on the other, and merge both in a statutory indemnity, fixed and certain; that for these benefits the parties are required to give up "the doubtful privilege of having a jury assess his damages, a considerable part of which, if recovered at all, after long delay, must go to pay expenses and lawyer fees." In the case of *State v. Mountain Timber Co.*, 135 Pac. 645, it is held

that the right to regulate the management of industries is so within the police power as that workmen's compensation acts are valid, though thereby the injured employe is deprived of a jury trial.

a. The right to trial by jury is not absolute in the sense that it has universal application. There is not a general right to such trial in special proceedings. *Green v. Smith*, 111 Iowa 183; *In re County Printing*, 156 Iowa 282.

30. JURY: right to jury: scope of right. There are cases holding it to be error to submit some ordinary actions to a jury, even in an advisory way. *Porter v. Butterfield*, 116 Iowa 725. No jury is allowed in inquests such as juvenile delinquent acts. The right exists only in cases where it existed at the adoption of the Constitution. *Cunningham's case* (Mont.) 119 Pac. 554.

b. The Federal Constitution does not regulate the granting or denying jury trial by the state, but has reference to administration of the Federal law in the Federal courts.

31. JURY: right to jury: Federal Constitution. *Cunningham's case, supra; State v. Mountain Timber Co.* (Wash.), 135 Pac. 645, 646.

No fundamental rights are disturbed because said defenses have been eliminated or modified, nor by changes made in presumption of fact.

VII. Aside from the question whether the act is wrongfully compulsive, there is little more to be said upon the general insistence that the statute violates the guaranties of due

32. CONSTITUTIONAL LAW: due process: workmen's compensation act. process of law and of equal protection of the laws, and that it effects a wrongful abridgment of the privileges and immunities of citizenship.

In *Merchants & M. Nat. Bank v. Pennsylvania*, 17 Sup. Ct. Rep. 829, it is said that, as the statute fixes the time when the bank shall make its report to the auditor general of the value of its shares, and directs him to hear the stockholders, it satisfies the requirement as to "due process of law" in tax proceedings, which is that the law shall fix the time and

place at which the assessment is to be made; the rule being that official proceedings are always, in the absence of express provision to the contrary, to be had at the office of the officer charged with the duties.

Buttfield v. Stranahan, 24 Sup. Ct. Rep. 349, holds that assuming that no opportunity was afforded by the Tea Inspection Act, 29 Statutes at Large, 604, to an importer of teas for a hearing with reference to the establishing of government standards of purity, quality and fitness for consumption, and the question as to whether his tea should be rejected as not entitled to admission because inferior to government standards, yet the statute is not thereby rendered objectionable as a denial of due process of law.

In *Cunningham's* case (Mont.), 119 Pac. 554, 555, it is held that the phrase "due process of law" does not necessarily mean trial or hearing by judicial proceeding, and in *State Sav. & Com. Bank v. Anderson* (Calif.), 132 Pac. 755, that due process of law does not necessarily imply a regular proceeding in a court of justice. In principle, the decision in *Cunningham's* case, *supra*, is that the power to enact a compulsory law exists, and that such enactment is not in violation of the due process clause of the Federal Constitution. And that is the holding of *In re Opinion of Justices* (Mass.), 96 N. E. 308, and of *Borgnis' case* (Wis.), 133 N. W. 209, wherein it is held that, since the commission administering the workmen's compensation law is a mere administrative board, it had power to investigate or determine facts without notice to the parties of each successive step in the proceedings, without thereby working a denial of "due process of law."

The Washington Compensation Act is sustained against objection that it unduly abridges the privileges and immunities of the citizen, and that it denies the equal protection of the laws. *Clausen's* case, 117 Pac. 1101. So is the Industrial Insurance Law of that state. *State v. Mountain Timber Co.* (Wash.), 135 Pac. 645. The Ohio Employer's Liability

33. CONSTITUTIONAL LAW: privileges and immunities: corporations.

Insurance Act is declared to be a valid exercise of legislative power, not repugnant to the Federal or State Constitution, or to any limitation contained in either. *State v. Creamer* (Ohio), 97 N. E. 602.

Finally, defendant admitted in answer that it is a corporation, and a corporation is not a "citizen" within the protection of the "privileges and immunities" provisions of the Federal Constitution. *Dutton v. Priest* (Fla.), 65 So. 282; *Paul v. Virginia*, 8 Wall. 168; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566; *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *Bank v. Earle*, 13 Pet. (U. S.) 519; *Warren Man. Co. v. Etna Ins. Co.*, 2 Paine (U. S.) 501; *Ducat v. Chicago*, 10 Wall. 410; *Pembina C. S. Mining Co. v. Pennsylvania*, 125 U. S. 181.

The effect of *Kentucky State Journal Co. v. Workmen's Comp. Bd.* (Ky.), 170 S. W. 1166, is to hold the Workmen's Compensation Board Act of Kentucky invalid because the Constitution of Kentucky prohibits the legislature from limiting the amount to be recovered for personal injuries and for injuries resulting in death.

DIVISION IV.

In our treatment of many objections made, we have assumed, *arguendo*, that the act is compulsory. In terms, it compels the doing of nothing and the acceptance of nothing, unless its provisions be accepted. In terms

24. MASTER AND
SERVANT:
workmen's
compensation
act: common
law defenses:
abrogation:
constitutional
law.

at least, it leaves the parties free whether to accept or reject. But the complaint is made that, even though this be so, and even though many requirements of the act, if in truth voluntarily accepted, work nothing inhibited by fundamental law, the freedom to take or leave is one in seeming only; that, notwithstanding its protestations to the contrary, the statute exercises unreasonable coercion to induce acceptance of it; and that, if what it provides independently

be constitutional, it is yet unconstitutional to compel acceptance of what would be valid if one were truly left free to accept or reject it.

There are some provisions not yet discussed: for instance, the provision of Section 26 that, if the employer and employe reach an agreement in regard to compensation under the act, a memorandum thereof filed with the commissioner is not to be approved by him unless its terms conform to the provisions of the act. Of this it is complained that it compels settlement to be made through the machinery of the statute; that it denies the right of the parties to discuss and settle differences, and so denies the right of contract. The last paragraph in Section 1, that where the parties have not given notice of the election to reject, every contract of hire between them, express or implied, shall be construed as an implied agreement between them on part of one to provide, secure and pay, and on part of the other to accept compensation in the manner provided by the act, is charged to work "arbitrary constructions which deprive defendant of its rights, remedies and property;" and it is said that this is especially accomplished by that part of Section 1 which creates a conclusive presumption that an employer defined by the act has elected to provide, secure and pay compensation according to its terms.

It is complained that, because this conclusive presumption prevails, unless certain prescribed notices are given by him which the statute prescribes terms for, it operates to deprive the employer of an election to remain outside of the penalties of the act. It is difficult to grasp the point that the employer has not such election because he is conclusively presumed to have elected to accept, unless specified notices are by him given. This surely does not compel him to accept the act, but is merely a provision what he must do to avoid a presumption that he has accepted. And it is also difficult to apprehend how this contention can be material here, where defendant concedes in his brief that he has rejected the law.

It is urged that Section 27, providing for the formation of an arbitration committee if the parties fail to reach an agreement in regard to compensation, in some way violates constitutional rights. And of Section 19, which makes presumptively fraudulent any contract or agreement made by the employer with the employe or other beneficiary of any claim under the provision of the act within 12 days after injury, it is said that thereby the state assumes to prevent any adjustment except through arbitration.

The insurance provisions have been noted before. An additional complaint is that insurance must be taken out by certain employers, no matter how small the risk of accident, and that the alternative is being subjected to what amounts to leaving them with "practically no ground of defense." It may not be amiss to again point out that, though no insurance be effected, substantial defenses are still left, if the employer rejects the act, which, as will be shown, he is at liberty to do.

2.

Let it be freely conceded that requirement of things proper in themselves may make the statute which requires them void. It is valid to provide a method of arbitration for those who freely accept the statute which provides it, and to limit the amount that shall be paid and received by those who freely submit to that limitation. Statutes have been quite generally enacted, and either never challenged or else sustained, in which the legislature limits the amount that might be recovered—say for death caused by negligence. If this may be done by the legislature, it may, of course, do the lesser, and provide that there shall be no recovery beyond a prescribed amount for an injury due to negligence which does not cause death. By the same token, since the act of assembly is public policy, one who makes a contract that recovery for injury shall have a certain maximum, or be arbitrarily a certain sum, is not violating public policy, if the legislature

affirmatively declares that such limiting is proper. If it be conceded that in the exercise of the police power the legislature may say that, where the parties agree to it, the compensation for injury shall be per schedule enacted by the legislature, it may certainly create a commission or administrative board or body, with power to administer such schedule as between parties who have freely agreed to such application of the schedules by arbitrament.

But all this assumes that the statute is in truth accepted, freely. If that be not so, such provisions as have been instanced may not save the statute, because in themselves proper. One may waive a constitutional right, but cannot be compelled to do so and be arbitrarily subjected to an option to stand upon one right under penalty of losing another. *Byers v. Meridian Printing Co.*, 84 O. St. 408. It would not save the act if every provision in it was itself valid, and though it said, in the plainest words, that all were free to reject it, if the death penalty were to be inflicted on rejection, or if one rejecting were thereupon denied the right to vote or to send his children to the public schools. The test, then, is whether the act in truth resorts to undue compulsion to induce acceptance.

The only compulsion is to eliminate and modify certain defenses, and to change certain court-made rules, already fully discussed. It has already been demonstrated, we think, that such eliminations, modifications and changes are, in themselves, a proper exercise of legislative powers.

In *Jeffrey v. Blagg*, 35 Sup. Ct. Rep. 167, dealing with the validity of the Ohio Compensation Act, which, among other things, was attacked for arbitrarily eliminating defenses like contributory negligence, assumed risk, and the negligence of fellow servants, from larger shops, while leaving them to smaller ones, the court said:

"No employer is obliged to go into this plan. He may stay out of it altogether, if he will."

The Supreme Court of Ohio has upheld the Ohio act on

the ground that it is purely optional and voluntary, both as to employes and employer, in so far as it deals with the requirement that, if the parties concerned elect to accept the act, they shall make certain payments to effectuate insurance against the results of accidents in the employment. Substantially this is affirmed in *In re Opinion of Justices* (Mass.), 96 N. E. 308, as to a statute substantially like the one at bar. It is therein said that, so long as it is elective, an act requiring an employer to become a subscriber, and the employe to waive right to sue at common law and accept compensation provided in the act, violates no constitutional requirement. The same is the holding of the Supreme Court of Wisconsin in *Mellen v. Industrial Commission*, 142 N. W. 187, 189. The *Deibeikis* case (Ill.), 104 N. E. 211, 212, holds that the requirement to arbitrate, being elective, is not an unconstitutional delegation of judicial power to the arbitrator, and parties may validly agree to submit to arbitrators other than the regularly organized courts. The *Borgnis* case (Wis.), *supra*, refuses to accede to the theory that the withdrawal of certain defenses coerces the employer, and that his acceptance coerces the employe, through fear of discharge.

It comes to this: Can a law be void for coercion which attaches no penalty to rejection of its provisions other than taking away, in whole or in part, that which the citizen may lawfully be deprived of without reference to any statute which might be either accepted or rejected? If the legislature may validly say: "You shall not defend with contributory negligence, nor with fault of fellow servants; you must prove you are not in fault for the injury suffered by your servant while doing your work; you must effect insurance so that your insolvency may not leave him a crippled public charge, or make a public burden of his dependents; you may contract with each other to arbitrate summarily, effectively and cheaply, and the award shall be not more than a stated sum, and you shall not contract for less payment"—can validly compel all this without enacting a workmen's compensation act—then

how can the saying that "these things you shall lose and these things you shall do unless you accept the act," be undue compulsion?

One who is at liberty to do or not to do a thing can always say, "I will not do what I can refuse to do, with or without reason, unless you do what I demand." There can be no coercion in the sight of the law effectuated by doing or not doing what one has the absolute right to do or not to do, no matter what terms are attached to doing or refraining. One who has absolute right to do or not to do a thing can attach to his doing or not doing any condition, no matter how unreasonable or arbitrary. The remedy is refusal to accede to the unreasonable demand. To threaten one with suit on a note and resulting costs unless something asked be done, is not duress if the note is confessed and due. One having a house to lease may decline to lease it unless the proposing tenant will agree to stay away from church, or to eat nothing but tomatoes. The remedy is to get another house.

Constitutional rights can be waived. That such waiver itself works a violation of the Constitution, where the inducement to waive does nothing prohibited by the Constitution, is inconceivable.

The only penalty for non-acceptance of this act is the infliction of what the legislature may do in any event. This is not invidious compulsion.

The trial court erred in holding that the act precludes the defense that the employer is in no wise at fault for the injury charged to him. For this, reversal must ensue. In

35. MASTER AND
SERVANT:
workmen's
compensation
act: non-ac-
cepting em-
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tributory neg-
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all other respects the decision below is right, and the validity of the statute under consideration is hereby affirmed. It follows: (1) that defendant has the burden of proving that the injury to the plaintiff was not the direct result and did not grow out of the negligence of defendant and that no negligence of defendant was the proximate cause of the injury; (2) that defendant

has the burden of proving that plaintiff was wilfully negligent, and thus negligent with intent to cause the injury, or that plaintiff's negligence was the result of his intoxication; (3) a defendant may plead other than said contributory negligences on part of plaintiff, but only as in mitigation of damages, in suits brought for injuries sustained after the taking effect of Section 3593-a of the Supplemental Supplement to the Code, 1915, and has the burden of proof on these; (4) any of said matters upon which he has the burden of proof, defendant must plead as a defense, or as matter in mitigation, respectively; (5) on issue's being joined by thus pleading, a jury trial must be had, unless trial by jury is waived.

The Fourteenth Amendment is not violated by the announcing of said rule of pleading.

The cause is remanded for proceeding therewith in all ways not inconsistent with this opinion.

The petitions for rehearing are each—*Overruled. Affirmed* in part and *Reversed* in part.

All the Justices concur.

SOPHIA PORTER, Appellee, v. GRACE HEISHMAN, Appellant.

HUSBAND AND WIFE: Alienation of Affections—Verdict—Sufficiency of Evidence. Evidence reviewed, and held sufficient to support a verdict in some amount for the alienation of the affections of a husband for his wife.

WITNESSES: Impeachment—Hostility. It is always relevant to inquire of a witness whether he is not hostile to the party against whom he is testifying, and whether he had not made threats to testify against such party, and, with proper foundation therefor, the witness may be impeached.

HUSBAND AND WIFE: Alienation of Affections of Husband—Excessive Verdict—\$10,000. In computing the damages suffered by a wife because of the alienation of the affections of the husband for the wife, the all-important inquiry is: What has the wife lost in the way of affections? Were the relations between the wife and

her husband, prior to the alienation by defendant, of the most amicable, harmonious and loving character, or had the wife, from other causes, already lost in large degree the affections of the husband? Tested by this rule, *held*, a verdict for \$10,000 was, under the record, excessive.

Appeal from Grinnell Superior Court.—P. G. NORRIS, Judge.

WEDNESDAY, OCTOBER 27, 1915.

REHEARING DENIED THURSDAY, APRIL 6, 1916.

ACTION at law to recover damages from the defendant for the alienation of the affections of plaintiff's husband. Upon issues joined, the case was tried to a jury, resulting in a verdict and judgment for plaintiff in the sum of \$10,000, and defendant appeals.—*Reversed and Remanded.*

J. H. Patton and W. R. Lewis, for appellant.

Bray, Shifflet & Wilkie, for appellee.

DEEMER, J.—I. Plaintiff was married to Art Porter in January of the year 1902. She was his senior by several years, and at the time of his marriage, the husband was a minor. After marriage, they lived on a farm for some years, when they, in the year 1909, moved to Grinnell, and shortly thereafter, the husband became interested in the automobile business, conducting a small garage and repair shop.

Defendant is the wife of E. C. Heishman, and they, too, lived on a farm for some years before moving to Grinnell, some time in the year 1908. At the time of trial, defendant was about 42 years of age, and she had two sons, one 21 and the other 19 years of age. According to the record, defendant became acquainted with Art Porter some time in the year 1911, the exact time being in dispute; but the acquaintanceship was not earlier than February and not later than the fall of

1. HUSBAND AND WIFE: alienation of affections: verdict: sufficiency of evidence.

that year. The defendant's husband owned an automobile, and had occasion to have it repaired and to buy supplies for it from Art Porter. This commenced some time in the fall of the year 1911. Some time in the fall of 1911, the Porter family arranged to get milk from the Heishmans, and, for some months, either plaintiff's husband went for it or it was delivered to the Porters by one of the defendant's boys. At the time when plaintiff was getting milk, he (Art Porter) would go frequently into the defendant's house and play cards with defendant's husband or the boys. Porter rode in the Heishman auto several times during the year 1911, and, becoming an agent for the sale of what is known as the Carter car, he thought the Heishmans a good prospect, and took them riding several times in one of these cars. Finally the family became interested in the new car and agreed upon its purchase, delivery to be made at Des Moines on the fourth day of July, 1912. Defendant had not met the plaintiff until that day, when plaintiff insisted upon making the trip to Des Moines with the Heishmans, to get the car. On the day preceding, plaintiff and her husband had some words about the Des Moines trip and regarding the defendant; and plaintiff testified that, on this occasion, her husband struck her, knocking her down and giving her a black eye. On the next day, plaintiff and her husband and defendant and her husband went to Des Moines to get the car. All rode in the car that day and spent part of the afternoon in one of the parks in the city; but they did not drive the car home. Plaintiff says that this was by reason of a prior agreement between her husband and Mrs. Heishman that they would not take it back to Grinnell with them that day, but would return and bring it back when plaintiff was not along. In any event, plaintiff's husband, defendant and one of her sons went to Des Moines on the sixth day of July and brought the car back to Grinnell. It was arranged at the time of the purchase that the car should be kept at Art Porter's garage after it was brought home, and

that Porter should teach the defendant how to drive it. There was also some kind of an arrangement to store the auto without expense by Porter, in order that he might use it for demonstrating purposes. Plaintiff says that she became suspicious of her husband's conduct with defendant some time prior to the making of the Des Moines trip, and had trouble with him over his conduct with Mrs. Heishman; and, on the morning of July 4th, said to defendant that there was too much talk going around about her riding around town so much with plaintiff's husband. This was squarely denied by defendant, who says that no complaint was made to her until about Christmas of the year 1912.

To all outward appearances, the relations between the two families were amicable until the month of December, when plaintiff upbraided the defendant because of the talk about her and plaintiff's husband. This was again repeated in January, 1913, in a talk between plaintiff and defendant and her husband. Before that, the parties were frequently together; they took many rides in automobiles around the city and into the country, attended band concerts and moving picture shows, and the defendant and her family had Thanksgiving dinner at the Porter home. All family relations were broken between plaintiff and the defendant and her family at this January meeting, and plaintiff's husband left home and did not return until February 27, 1913, remaining but for a few days, and then taking what was supposed to be his final departure, but returning again in May, after plaintiff had brought this suit, when it is claimed he threatened to kill her, and locked her in a bathroom until she would sign some papers disposing of this action. In September of the year 1912, plaintiff's husband and defendant attended the Marshalltown Fair together, taking defendant's machine there for demonstrating purposes. According to some of the witnesses, and as stated by defendant, she went under an arrangement that she should receive pay for her time while there, for allowing her car to be used and for assisting in making sales. The

two stayed in Marshalltown for several days, until they were located by the plaintiff. After that, they made a trip together in company with defendant's sister-in-law and another man, and there is ample testimony, if believed by a jury, to show that the plaintiff's husband and the defendant had sexual intercourse on both occasions. There is also a great deal of testimony tending to show that plaintiff's husband was frequently at defendant's house at all times of the day and night, oftentimes when defendant's family was away from home; that defendant was daily and often several times a day at the Porter garage; that they had long daily conversations over the telephone; and that plaintiff's husband called defendant endearing names. They were seen quite often together at Des Moines and Colfax, sometimes at hotels and at other times on the street, or in stores. There is also testimony that plaintiff's husband purchased clothing and gave it to the defendant, although this is denied by defendant and her husband.

Although this is but a part of the record, enough has been recited to show that there is ample testimony to support a verdict for the plaintiff in some amount, and that there is no merit in the defendant's contention that plaintiff did not make out a case for the jury.

II. Some rulings on testimony are challenged. We shall refer to but one of them, as the others are manifestly correct, and need no attention, because they involve no new or doubtful propositions. One R. J. Patterson, a witness for the plaintiff, gave very material and damaging testimony regarding the conduct of plaintiff's husband and the defendant while at the Marshalltown Fair. For the purpose of showing his interest in the case and his hostility to the defendant, the following record was made:

2. **WITNESSES:**
impeachment:
hostility.
"I do not know Robert Ramsey. I did not to my knowledge meet him and talk with him here in Grinnell when I was here on the other trial. Q. And did you have a talk with some man and Arthur Porter here on the streets here in Grinnell?"

nell while you were here attending the other trial? A. No, sir. Q. And didn't you talk with him and Arthur Porter here on the streets in Grinnell about the fact that you had a woman here at the Monroe Hotel when you were here at that time? (Same objection by plaintiff as last made—incompetent, irrelevant, immaterial, not proper cross-examination. Overruled, and plaintiff excepts.) A. No, sir. Q. And did you talk with them on the streets here in Grinnell at the time you were here attending that trial about having registered at the Monroe Hotel as R. G. Bates and wife? A. No, sir.

"Mr. Bray: Same objection.

"The Court: You may answer.

"Mr. Bray: If the court please, it seems to me that this is the same identical proposition.

"The Court: This is as to his statement about it.

"Mr. Bray: But I want to call your honor's attention to this proposition. The only statements they can prove by him are any statements which are contradictory of the testimony he has given on this trial, and which are material. If it were true that this man has committed an immoral act, and if he had made statements about it, that contradicts nothing that he testified to as a witness. I don't know under what rule that would be admissible. It is exactly in the same class with the other testimony that has been excluded.

"The Court: Yes; I think so. The answers to those last two questions may go out. (Excepted to by defendant.)

"Q. And did you not say to them on the streets here in Grinnell at the time you were attending that other trial of this case that, if they brought that fact—that is, that you had a woman there at the hotel that was not your wife—against you, that if they brought that back against you, didn't you in substance say to them you would go on the witness stand and give the defendant hell? A. I did not. Q. And did you not in substance at that time, that same time, to these same parties in the same place, say in substance that you would testify that you and Art Porter had gone to Marshalltown

with the Heishman women and slept at hotels with them?
A. I did not."

Ramsey was produced as a witness for defendant, and the following is taken from the record:

"I was here at the former trial of this case in June and July. I know R. J. Patterson when I see him. I had a conversation with him here in Grinnell during that trial. Q. Did he say to you in substance in that conversation that if they brought up something that occurred down here at the Monroe Hotel against him that he would go on the stand as a witness and give them hell, and that he would tell something they did not want to hear? (Objected to as incompetent, irrelevant and immaterial, and if for the purpose of impeachment, no sufficient foundation has been laid for this testimony. Objection sustained, and defendant excepted.)"

Facts showing hostility of a witness are not collateral to the main inquiry; and if a witness denies this hostility or denies having made statements showing such hostility, he may be contradicted and also impeached by showing that he made such statements. No objection was made to the interrogatories laying the foundation for the impeachment, and a proper foundation was laid for Ramsey's testimony. We think the ruling sustaining the objections thereto cannot be sustained. *Powell v. Martin*, 10 Iowa 568; *Rice v. Rice* (Mich.), 62 N. W. 833; *Alward v. Oaks* (Minn.), 65 N. W. 270; *Beardsley v. Wildman*, 41 Conn. 515; *Aneals v. People* (Ill.), 25 N. E. 1022; *Skinner v. State* (Ind.), 22 N. E. 115.

III. The verdict for \$10,000 is said to be excessive. We are constrained to hold that this is true. In order to sustain so large a recovery, it is necessary to show that the relations between the plaintiff and her husband were of the most amicable, harmonious and pleasant character; that the defendant ruthlessly, maliciously and without excuse disturbed these relations, and by her own machinations destroyed the husband's love for his wife and broke up the

3. HUSBAND AND WIFE: alienation of affections of husband: excessive verdict: \$10,000.

theretofore pleasant relations existing; that, prior to that time, plaintiff's husband was faithful and true and religiously observed his marital obligations; and that he was led astray by the wicked wiles of the defendant. If he, instead of the defendant, was the aggressor; if his love and affection for his wife were of such character that, notwithstanding, he sought the society of other women and left his home to gratify sexual or other passions, defendant should not be held liable to the same extent as if she alone were to blame. In all such actions, the law must take into account the nature and character of the husband's affections, his loyalty to his home and to his wife, whether he was seeking the company of other women, and generally the nature of defendant's wrong and her responsibility for the situation. The testimony shows beyond all possibility of dispute that, before Porter met the defendant, or at least before the relations between them were any more than formal, he (Porter) frequently went to Des Moines, where he would stay several nights at a time; that he carried a key to a room in the city of Des Moines; that he frequently was in company with strange women in Des Moines and occasionally met them by appointment; that he became infected with a venereal disease; that he purchased shoes for a Des Moines woman; that, in his conduct with some young women, he caused his wife to become suspicious of him. In the fall of the year 1911, trouble arose between him and his wife over his conduct with other women, and he frequently abused his wife because she upbraided him. In his relations with the defendant, he seemed to be the aggressor. The first times they went out riding were on his invitations. According to the testimony, Porter made most of the advances, and after a time, was not at all secretive in his conduct. He planned most of the trips away from home and was largely responsible for the defendant's conduct, whatever it may have been. We are not to be understood as saying that plaintiff is not entitled to some damages, although her husband may have been at fault. What we do mean to hold is that plaintiff's husband

indicated by his conduct that she had largely lost his affections before the defendant came into their lives. They had trouble regarding sexual intercourse with each other, and there is testimony tending to show that he lost his affections for her and requested her not to be so demonstrative of her affections. Whatever the faults of the defendant, plaintiff's husband did not repel her advances, but courted and solicited them, thus demonstrating to some extent his want of affection for his wife.

A verdict of \$10,000 under this record, which we have not attempted to set out in detail, must have been the result of passion and prejudice, and not of deliberate judgment. From a financial standpoint, plaintiff lost nothing but the support of her husband. He had no means save what he earned from day to day; and while this is not in any sense controlling, it is important to be considered in looking at the verdict. Plaintiff is entitled to such damages as resulted from defendant's wrongful conduct, but not for any infringement of her marital rights due to some other cause. The case differs somewhat from one where a man steals away the affections of a wife. In such affairs, the man is generally the aggressor. By nature, it is the male of the species, and not the female, who makes such advances. It is not true in such matters that the female is more deadly than the male. Of course, a woman may become so depraved, especially in sexual matters, as to be worse than the man; but even then, the male usually makes the first advances. Were there no other ground for setting aside the verdict than the amount thereof, we would feel it our duty to reverse the case for that reason alone.

IV. Other matters need not be considered, for they are not likely to arise on a retrial. We discover no errors in the instructions of which defendant may complain, or in the rulings on testimony, save as above indicated; but for the reasons pointed out, the judgment must be and it is—*Reversed and Remanded*.

WEAVER, GAYNOR, PRESTON and SALINGER, JJ., concur.

STATE OF IOWA, ex rel D. M. FREEMAN, Appellee, v. D. C. CARVEY, Appellant.

PLEADING: Motions—When Not Allowable—Motion to Strike Motion. A motion to strike another motion is unknown to our practice.

PRINCIPLE APPLIED: Plaintiff, claiming that the petition and answer thereto entitled him to judgment, moved for judgment on the pleading. Defendant moved to strike the motion for judgment. *Held*, the motion to strike was properly overruled.

PLEADING: Motions—Motion for Judgment on Pleadings—When Allowable. A motion for judgment on the pleadings is proper whenever, in the opinion of the mover, the answer raises no issue of fact to be tried, and the allegations of the petition and answer, taken as true, entitle him to the relief prayed. And this is true even though a demurrer might reach the same result.

PLEADING: Motions—Judgment on Motion—Effect of Motion. A motion by plaintiff for judgment on the pleading necessarily admits the truth of affirmative matters pleaded in the answer.

OFFICERS: Vacancies and Holdings Over—Death of Re-elected Incumbent—Right of Appointee. The death of the re-elected incumbent of a public office before entering upon the new term creates a vacancy in the term which he was serving *at the time of his death*, but not in the new term *for which he had been elected*. (Sec. 1266, Code, 1897.) It follows that the duly appointed and qualified appointee to fill such vacancy possesses two rights: (1) To serve for the balance of such existing term, and (2) to hold over until the next general election, for the new term for which deceased was elected, provided he qualifies anew, within 10 days after such new term commences. (Secs. 1265, 1275, Code, 1897; Secs. 1060, 1177, Code Supp., 1913; Constitution, Art. 11, Sec. 6.)

OFFICERS: Right to Office—Quo Warranto—Burden of Proof. Re-lator in *quo warranto*, seeking to establish his right to a public office as a rival claimant thereto, must recover, if at all, on the strength or validity of his own title to the office, and not upon the weakness or defective character of the incumbent's title.

CONSTITUTIONAL LAW: Construction—Tenure of Office—Statutory Vacancy and Qualification. The constitutional provision that "all persons appointed to fill vacancies in office shall hold *until*

the next general election" (Art. 11, Sec. 6) is not inconsistent with the authority of the legislature (a) to define a "vacancy" or (b) to prescribe and regulate the manner of qualifying for office. (Secs. 1266, 1275, Code, 1897.)

Appeal from Buchanan District Court.—H. B. BOIES, Judge.

FRIDAY, NOVEMBER 26, 1915.

REHEARING DENIED THURSDAY, April 6, 1916.

THE opinion sufficiently states the case.—*Reversed.*

Hasner & Hasner, for appellant.

R. J. O'Brien and Edwards, Longley, Ransier & Smith, for appellee.

WEAVER, J.—Jesse Lyon was a member of the board of supervisors of Buchanan County for the term ending January 2, 1915; and at the general election held in November, 1914, he was re-elected to succeed himself, but died on or about December 1, 1914. On December 16, 1914, the county auditor, county recorder and clerk of the district court, under the statute authorizing such action (Section 1272, Code Sup., 1913), met and appointed the relator herein, D. M. Freeman, to fill the vacancy created by the death of Lyon. Relator was a citizen of the county and eligible to the office. On the same day, relator executed and filed his official bond with the usual oath of office, and acted as a member of the board of supervisors until and including January 1, 1915. On January 2, 1915, the county auditor, recorder and clerk again met and appointed respondent herein, D. C. Carvey, to fill the vacancy caused by Lyon's death, in the office of supervisor for the term beginning January 2, 1915. Two days later, respondent, who was also a citizen of the county and eligible to the office, qualified under the appointment by filing his official bond and oath of office, and entered upon the duties of the position. On January 26, 1915, the relator served a

written demand upon the county attorney that he bring an action in *quo warranto* to oust the respondent from the office of supervisor. The county attorney refused to proceed as requested, and thereupon, on January 28, 1915, relator having prepared the petition in this case, presented it to Hon. C. W. Mullan, judge of the district court, who endorsed thereon permission to the relator to prosecute such action. On February 2, 1915, the action was begun by filing the petition in the clerk's office.

The petition sets out the facts substantially as we have stated them. Respondent, appearing, filed an answer, in which he admits that the county attorney had refused to bring the action; admits the death of Lyon while in office as supervisor for the term ending January 2, 1915, thereby creating a vacancy in the office for the remainder of that term; admits that the relator was appointed to fill said vacancy, was eligible thereto and duly qualified therefor; admits that relator took possession of the office and discharged the duties thereof until January 2, 1915; admits that before his death, the said Lyon above mentioned had been elected supervisor for the term beginning January 2, 1915, and that on said day, there being a vacancy in the office for said term, the appointing board for the county appointed the respondent to fill the same, and that he thereupon qualified for the office as provided by law, and thereby became entitled to hold such office until the next election at which his successor could be chosen. He further alleges that the relator never qualified, as required by law, to hold the office, except under the appointment of December 16, 1914, and that the bond and oath then filed by him constitute the only qualification he has made or attempted at any time. He denies also all matters alleged in the petition and not in the answer admitted.

These pleadings having been filed, the relator filed a motion for judgment thereon in his favor, stating as grounds therefor that the petition and answer show clearly and conclusively that, as the person named in the appointment of Decem-

ber 16, 1914, the relator is entitled to hold the office until the vacancy is filled at a regular election, and that the appointment of the respondent is therefore void. Respondent thereupon moved to strike the foregoing motion from the files, because the only proper way to raise such objection to a pleading is by demurrer. The court overruled the motion to strike and sustained the motion for judgment in favor of the relator. The respondent appeals.

I. We are first met with a question of pleading and practice. It is appellant's position that his motion to strike the appellee's motion for judgment should have been sustained.

1. **PLEADING: motions: when not allowable: motion to strike motion.** A motion to strike another motion is not provided for in our practice act and is not to be approved. If there be any reason why a motion should not be considered or should be denied, it constitutes sufficient reason why it should be overruled. A motion to strike in such case only encumbers the record.

The objection that the motion for judgment presented only such questions as could have been settled by demurrer is not well taken. Possibly a demurrer to the answer would have reached the same end, but we think, under the practice prevailing in the trial courts of the state, if it was the relator's judgment that the allegations of the answer raised no issue of fact to be tried, and that the allegations of both petition and answer being all taken as true entitled him to the relief prayed, it was competent for him to move for judgment on the pleadings, and there was no prejudicial error in entertaining the motion. Whether the ruling sustaining the motion and entering judgment for the relator can be sustained is another question, which we shall consider in the next paragraph of this opinion. It is no sufficient objection to this holding that, if the relator had demurred, opportunity would have been given respondent to amend if so advised. Motions attacking a pleading are frequently given effect as

2. **PLEADING: motions: motion for judgment on pleadings: when allowable.**

demurrers, and an order sustaining such a motion has never been held to deprive the pleader of the chance to amend if he indicate such a desire. We must assume that, if appellant in this case had wished to amend, he would have said so, and that leave would have been given. No such request was made. But it is said that the answer contained a general denial, and such being the case, neither demurrer nor motion for judgment would lie. There was no general denial. The answer denies nothing in the petition except those allegations "not expressly herein admitted," and then proceeds to admit practically all the matters alleged by the relator. The very general character of the admissions and the qualified character of the denial are such that it may fairly be said that the latter raises no material issue upon any pertinent fact. Of

3. PLEADING: motions: judgment on motion: effect of motion.

the new or affirmative matters pleaded in the answer, it is to be said that the motion for judgment necessarily admits the truth thereof.

The petition and answer taken together disclose no material disputes of fact. The real question presented is one of law, and there was no error in so treating it.

II. The real question before us may be briefly stated as follows: Under the conceded facts, was the relator's appointment to the office of supervisor an appointment to a vacancy ending with that term, January 2,

4. OFFICERS: vacancies and holdings over: death of re-elected incumbent: right of appointee.

1915, or did he, by such appointment, acquire the right to hold the office until the vacancy could be filled at the next general election?

The cases treating questions having more or less likeness to the one we have here stated are very numerous and are to be found in the decisions of the courts of many jurisdictions. Upon no one phase of these contests does there seem to be an entire consensus of opinion, and upon many it is impossible to reconcile the precedents. To some extent, the apparent disharmony has its rise in the varying provisions of state Constitutions and statutes; and in

order to keep our discussion within bounds, it is well that we recall at the outset what our written law has to say in this regard.

Section 6 of Article 11 of the Constitution of Iowa reads as follows:

"In all cases of elections to fill vacancies in office occurring before the expiration of a full term, the person so elected shall hold for the residue of the unexpired term; and all persons appointed to fill vacancies in office shall hold until the next general election, and until their successors are elected and qualified."

In Code Section 1266, the legislature defines "vacancy" and when it shall be deemed to exist as follows:

"Every civil office shall be vacant upon the happening of either of the following events:

- "1. A failure to elect at the proper election * * *;
- "2. Failure of the incumbent *or hold-over officer* to qualify within the time prescribed by law;
- "3. The incumbent ceasing to be a resident * * *;
- "4. The resignation or death of the incumbent;
- "5. The removal of the incumbent from, or forfeiture of, his office * * *;
- "6. The conviction of incumbent of an infamous crime * * *;
- "7. The acceptance * * * of a commission to any military office * * *."

It is further enacted that:

"Except when otherwise provided, every officer elected or appointed for a fixed term shall hold office until his successor is elected and qualified, unless he resigns, or is removed or suspended, as provided by law." Code Section 1265.

Also:

"The term of office of all officers chosen at a general election for a full term shall commence on the second secular day of January next thereafter, except when otherwise pro-

vided by the Constitution or by statute; that of an officer chosen to fill a vacancy shall commence as soon as he has qualified therefor." Code Supp., 1913, Section 1060.

A county supervisor is required to give bond (Code Supp., 1913, Section 1182-a); and in common with other elected officers, he is to file this bond with his oath of office before noon of the second secular day of January after the election (Code Supp., 1913, Section 1177). When, however, "it is ascertained that the incumbent is entitled to hold over by reason of the nonelection of a successor, or for the neglect or refusal of the successor to qualify, he shall *qualify anew* within the time provided by Section 1275 of the Code." Code Supp., 1913, Section 1195.

Turning to the cited Section 1275 of the Code, we find it reads as follows:

"Persons elected or appointed to fill vacancies and officers entitled to hold over to fill vacancies occurring through a failure to elect, appoint or qualify, as provided in this chapter, shall qualify within ten days from such election, appointment, or failure to elect, appoint or qualify, in the same manner as those originally elected or appointed to such offices."

The foregoing appears to constitute all the written law of the state bearing upon the subject matter of this litigation; and at first blush, it would seem too comprehensive, clear and explicit to call for construction, and to provide for every variety of circumstance which could reasonably be anticipated. It does not, however, in express words provide for the contingency of the death of a re-elected officer after his reelection and before he qualifies for the new term. Notwithstanding this omission, we are persuaded that provision for such a case is to be found in the evident spirit and intent of the legislative language; and this being ascertained, we shall have little occasion to enter upon a review of the many precedents to which our attention has been called. That the death of Lyon created a vacancy in the office of supervisor is declared by statute. Indeed, in the absence of any statute, and in the

very nature of things, it must be said that, whenever an office exists and there is no incumbent to perform its functions, there is a vacancy. At the date of his death, deceased was in possession of the office and vested with the right to retain it to the end of his current term. He had yet acquired no right to the succeeding term. He had been elected, but he had not qualified. The time for him to elect whether he would qualify or would decline to assume the responsibility for another term had not yet arrived. The vacancy created by his death was a vacancy of the office for the remainder of his current term. While there is considerable confusion in the cases, the great weight of authority is that where a re-elected incumbent dies before entering upon the new term, his death creates a vacancy in the term which he was then serving, but not in the term upon which he had not yet entered. *State ex rel. Sheets v. Speidel*, 62 O. St. 156 (56 N. E. 871); *State ex rel. Hellier v. Vincent*, 20 S. D. 90; *People v. Nye* (Cal.), 98 Pac. 241.

So, too, and quite in point in principle, is the holding by much the greater number of courts that the death of a person elected to office before the time arrives for him to qualify therefor or to enter upon his official duties does not create a vacancy; and this is especially true where, by Constitution or statute, it is provided that the incumbent of such an office shall hold the same for the term provided by law, and until his successor is elected and qualified. See the following cases cited in note to *Commonwealth v. Sheatz* (Pa.), 50 L. R. A. (N. S.) 376; *Kimberlin v. State*, 130 Ind. 120 (29 N. E. 773); *People v. McIver*, 68 N. C. 467; *Lawrence v. Hanley*, 84 Mich. 399 (47 N. W. 753); *State ex rel. Hoyt v. Metcalfe*, 80 Ohio St. 244 (88 N. E. 738); *Commonwealth v. Hanley*, 9 Pa. 513; *State v. Benedict*, 15 Minn. 198; *People v. Nye* (Cal.), 98 Pac. 241.

As we have seen, this state has provided, both by Constitution and by statute, that one who is elected to office for a stated term shall hold for the period of such term and until his successor has been elected and qualified. The right to hold

over is not limited to elected incumbents, but extends without doubt to incumbents serving by appointment.

It follows from the foregoing that the appointment of the relator to the office of supervisor on December 16, 1914, was an appointment to fill the only vacancy then existing—the vacancy in the office for the remainder of the current term, and no more. Having accepted the appointment and qualified thereunder, relator's right to continue in office after noon of the second secular day of January, 1915, was not referable to any authority in the appointing board to fill a vacancy before it occurred, but to the hold-over provisions of the Constitution and of the statute by which, upon failure of a successor to appear and qualify at the proper time, the incumbent is entitled to continue in the position.

If this were all the record, the case would be free from difficulty and could be readily affirmed. But we have more. In this state, as we have seen, it is expressly provided by statute that an officer entitled to hold over to fill a vacancy and proposing to exercise such right "must qualify anew" within ten days; and, upon failure to do so, the office becomes vacant. It stands admitted that the relator did furnish the proper bond and execute the proper oath of office on December 16, 1914, to qualify him for the acceptance of the appointment made on that date, but he has never attempted to qualify as a holdover. Unless, therefore, we are to hold that the original qualification under his appointment to fill the vacancy created by the death of Lyon was sufficient, and that the statute which required a holdover to "qualify anew" has no application to such a case, it inevitably follows that when the relator instituted this action, he had vacated the office. But we see no escape from the conclusion that, as a holdover, it was his duty to requalify. No exceptions to the statutory requirement are expressed, and it is not our province to make any. Had Lyon lived, his qualification for the term he was then holding would not have been sufficient to satisfy the requirement upon him to requalify for the new term, nor

would it have satisfied such requirement had he not been re-elected, but was claiming to hold over because the person elected to succeed him had died or refused to qualify. Now the effect of relator's appointment was simply to induct him into office with the same rights attaching to his incumbency as had attached to the incumbency of Lyon. His right to hold over was neither more nor less than Lyon would have had, and that right in each instance was subject to be lost by failure to qualify anew, as the statute directs. Having failed to qualify, and the statute having declared that such failure shall create a vacancy in the office, is relator in position to maintain this action?

While the phrase *quo warranto* persists in our legal literature and in the language of lawyers and courts, the ancient proceeding thus named has long been obsolete in most jurisdictions. It has not been carried into our

5. OFFICERS: right to office: *quo warranto*: burden of proof. statutes or our practice; but, as in most states, we have a statutory proceeding for the testing of official and corporate rights, Code Section 4313, *et seq.* It authorizes a civil action brought by ordinary proceedings in the name of the state; and among the stated purposes of such action, is the ousting of any person unlawfully holding or exercising a public office. It may be brought as a matter of right or duty by the public prosecutor, and in some cases, where the prosecutor refuses to act, it may be brought by a private person who has some interest in the matter and obtains leave of the court or judge to proceed therein. As interpreted and applied in this state, it is proper to make use of this proceeding as an alternative or cumulative method of contesting the validity of an election or appointment to a public office; and in such cases, it is ordinarily brought upon the relation of one who claims a right to such office against an incumbent who excludes him therefrom. *Haverstock v. Aylesworth*, 113 Iowa 378. Though brought in the name of the state, it is, when thus used on the relation of

a claimant to a contested office, essentially a personal action for the determination of the conflicting claims of the relator and respondent, and is subject to the general rules obtaining in the trial of disputed rights in other actions at law. *Desmond v. McCarthy*, 17 Iowa 525; *State v. Minton*, 49 Iowa 591; *State v. Stein* (Neb.), 14 N. W. 481; *Tarbox v. Sughrue*, 36 Kan. 225; *Res Publica v. Griffiths*, 2 Dallas (U. S.) 112.

When the action is brought by the public prosecutor in the name of the state or upon his own relation in his official capacity for the vindication or protection of public rights, the burden is probably upon the responding incumbent of the office in the first instance to show by what right he is exercising its functions. At least, such was the ancient rule. But where the proceeding is made use of to settle the dispute of rival claimants to the same office, the burden is upon the relator to show the better title in himself. Stated otherwise, the relator must recover, if at all, on the strength or validity of his own title, and not upon the weakness or defective character of the incumbent's title. *State v. Moores* (Neb.), 72 N. W. 1056. In the cited case, it is said:

"It is important to remember that this action was not instituted by the attorney general, but was brought by private persons asserting the right to the offices in question. Had the attorney general been the relator, it would have devolved upon the respondents to show that they were rightfully inducted into office. * * * When the information is filed by a private person, the same rule does not obtain. He is required to show that his title to the office is better than that of the incumbent, and must recover, if at all, upon the strength of his own title, and not upon the weakness of the claim of his adversary."

To the same point is *Commonwealth v. Dillon*, 81½ Pa. (F. P. Smith 32) 41.

In a proceeding of this character, the Minnesota court says:

"The relators must show title in themselves before they

can properly inquire by what authority the respondents exercise their office." *State v. Oftedal*, 75 N. W. 692, 696.

So also it is said by the Michigan court:

"The statutory relation by a private claimant of office is purely private litigation and is substantially a civil proceeding, in which the plaintiff has the burden of the controversy. No private citizen has any right to compel an officer to show title until he has shown his own right in the first place to attack it. In such a controversy, it is manifest that a plea showing that relator has no rights is as appropriate as one setting up title in the respondent." *Vrooman v. Michie*, 36 N. W. 749.

So in Indiana:

"The relator must recover, if at all, on the strength of his own title to the office. He cannot prevail upon any infirmity or weakness of the title of the appellee." *Benham v. Bradt*, 84 N. E. 1084.

The same proposition is again affirmed by the same court in *State v. Wheatley* (Ind.), 66 N. E. 684. In the same case, it is held that a relator's petition which does not show that he has qualified, as required by law, for the office claimed by him, is fatally defective.

In *People v. Lacoste*, 37 N. Y. 192, 194, it is said:

"The relators, in order to succeed in this action, must establish by competent evidence, that, at the election, they, instead of the defendants, were duly elected. The burden is upon them."

See, also, *State v. Kupferle*, 44 Mo. 154; High on Extraordinary Remedies, Sec. 656. Indeed, for the purposes of this case, counsel for appellee expressly concede that:

"It is the proper tenure of office of the relator under his appointment which determines this controversy. If his tenure ceased with the ending of the unexpired term which Lyon was then (at the time of his death) serving, then the defendant Carvey was improperly ousted, and this case should be

reversed; but if, under that appointment, the relator was entitled to hold until the general election of 1916, the decision was right and should be affirmed."

Recurring to the situation of the parties at the time this action was begun, we find the respondent in possession of the office and performing its duties. The relator instituted this action to oust the respondent in his favor, alleging as the basis of his right thereto his own appointment to fill the vacancy caused by the death of Lyon, who was at that time the lawful incumbent for the term to expire in the following January and was also the re-elected candidate, who would have been entitled to the position for the next term, had he lived and qualified therefor, as required by law. By virtue of that appointment and the qualification and the appointment made thereunder on the day of his appointment, and without qualifying anew as a holdover, he challenges the right of the present incumbent of the office. Such being his attitude, we think it clear, both upon principle and precedent, as well as upon statutory grounds, that he has failed to make a case entitling him to a judgment of ouster against the respondent. As we have already said, the only vacancy existing in the office at the time of his appointment was that created by the death of the incumbent. The deceased was then the incumbent of the office for the term ending the second secular day of January, 1915, and the vacancy so created could not be of longer duration. A vacancy in the office for the next term could only be brought to pass or exist when the hour for entrance thereon arrived, and no duly qualified person appeared to take possession or to assume its functions by virtue of an election or appointment thereto, or as an incumbent entitled to hold over upon failure of a successor to qualify. It is true that cases are found and cited to us to the effect that an appointment thus made continues with unimpaired force and effect over the entire period from its date until the next general election, even though the term which the deceased incumbent was serving at the time of his death should meanwhile expire; but so far as we have

been able to examine these precedents, not one of them involves, as does this case, the effect of a statute which defines a vacancy and points out specifically when it may be said to exist, or of a statute which requires a holdover to qualify anew, and declares that, upon failure to comply with this requirement, the office shall become vacant. Holding, as we do, that wherever, by Constitution or by statute, an incumbent is entitled to hold over beyond his stated term, if, at the end thereof, there is no qualified successor, the death of an incumbent can create no vacancy beyond the end of his current term, we are unable to follow the lead of the precedents upon which appellee relies. The result is therefore inevitable that, by his appointment to the vacancy, relator became the rightful incumbent of the office until the second secular day of January, and as such incumbent, he became entitled, under the Constitution and statute, to hold over until the next general election. But he could, by his own act or neglect, lose that right and suffer the office to become vacant by failing to qualify anew. The

6. CONSTITUTIONAL LAW:
construction:
tenure of office:
statutory vacancy and
qualification.

constitutional provision is not inconsistent with the authority of the legislature to define a vacancy or to prescribe and regulate the manner of qualifying for office. It was the relator's duty to qualify anew. The ten days in which this might have been done had expired before this action was brought. By this failure, the office became vacant. Code Section 1266. Upon his concession as to the facts, he failed to show good title to the office in himself. This being the record, then, upon his own theory of the vital legal proposition in the case, and upon what we believe the better and greater weight of the authorities, the judgment of ouster in his favor cannot be permitted to stand.

We are cited to the case of *State v. Brown*, 144 Iowa 739, as holding that it is immaterial whether an appointee holding over qualifies anew. Such holding or such suggestion is not there found. The relator there had never been appointed to fill the vacancy. He had simply been designated by the court,

which had no power of appointment, to perform the duties of clerk until an appointment could be regularly made by the board of supervisors, and we held that he acquired no right of holdover, and it did not lie in his mouth to question the validity of the act of the board in filling the place by appointment.

This makes it unnecessary to enter upon discussion of the regularity or validity of the act of the appointing board in selecting the respondent to fill the office. For the reasons stated, the judgment below will be reversed and cause remanded, with directions to the district court to enter judgment in harmony with the views here expressed.—*Reversed.*

EVANS, C. J., DEEMER and PRESTON, JJ., concur.

L. A. WEBER, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD Co., Appellant.

CARRIERS: Carriage of Passengers—"Passenger" Defined. Plain-
1 tiff, a railway mail clerk, in case at bar, treated as a "passenger."

CARRIERS: Carriage of Passengers—Negligence—Derailment—Res
2 **Ipsa Loquitur—Presumption—Sufficiency of Explanation.** Derailment of a train, in passenger cases, proclaims negligence, irrespective of other allegations of negligence in the petition. In effect, a derailment says to the carrier: "You have been negligent; explain!" Whether the explanation is sufficient to quiet the accusing voice of the derailment by showing that the derailment was due to causes over which the carrier had no control and against which human foresight could not have guarded, is usually a jury question. To exculpate the carrier, the explanation of the derailment must go further than to show that the facts and circumstances thereof are as consistent with care as with negligence. The evidence of care must preponderate.

EVIDENCE: Opinion Evidence—Opinions from Observation—Ordinary
3 **Witness—Law of Necessity—Marks of Crowbar.** The opinion of an ordinary witness drawn from what he has observed is admissible when, from the nature of the subject under investigation, no better evidence can be obtained, or the facts cannot otherwise be fully presented to the jury.

DEEMER and PRESTON, JJ., dissent as to the application of the principle.

PRINCIPLE APPLIED: Action for personal injury caused by the derailment of a train. The defendant carrier, claiming that the derailment was due to a cause over which it had no control and against which human foresight could not have guarded, sought to show that a certain named party, just before the arrival of the train, had pried the spikes from the ties with a crowbar and removed the rail. Witnesses were permitted to describe the ties and the marks and indentations thereon, but were not permitted to state to the jury "what caused the impressions upon the ties." The court says: "They should have been permitted to say how the impressions, as they observed them, appeared to have been made there at that time."

TRIAL: Conduct of Counsel—Acting for Two Clients with Same
4 Interests—Misconduct. An attorney is not guilty of conduct inconsistent with his duty by acting for one client in a criminal action and for another and different client in a civil action, both actions growing out of the same transaction, when the interests of the two clients are identical, even though the conduct and advice of the attorney results in depriving the defendant in the civil action of the testimony of the defendant in the criminal action.

PRINCIPLE APPLIED: A train was derailed, the engineer killed, and a passenger injured. One K was arrested, tried and convicted of having caused the death of the engineer by deliberately wrecking the train. One H was attorney for K in the criminal action. While this criminal action was still pending, the injured passenger brought action, with said H as his attorney, to recover for his injuries. It was to the interest of K to show that he was not guilty. It was to the interest of the passenger to show that the wreck was caused by some negligence of the carrier—in a word, his interest was the same as the interest of K. It was to the interest of the carrier to show that K was guilty, and thus show that the wreck was due to a cause against which human foresight could not reasonably have guarded. The carrier attempted to take the deposition of K and thereby show K's guilt. K, on the advice or at the direction of H, refused to answer incriminating questions. Held, the attorney was not guilty of misconduct.

EVIDENCE: Hearsay—Exception—Declaration Against Interest—

5 Insanity of Declarant—Law of Necessity. Declarations of a person as to facts relevant to the matter under consideration are admissible in evidence, even between third persons, where it appears:

1. That the declarant is dead or insane.
2. That the declaration was against his pecuniary or proprietary interests.

3. That he had competent knowledge of the facts declared.

4. That he had no probable motive to falsify the facts.

DEEMER and PRESTON, JJ., dissent as to the holding that a showing of insanity may be the equivalent of death.

PRINCIPLE APPLIED: A train was wrecked; plaintiff was injured, and sought to recover damages. One K was arrested, and made oral and written statements, while sane, reciting how he had caused the wreck by removing a rail from the track just before the train arrived. Later, K was duly adjudged insane. After being confined for some time, the authorities released him, not as having recovered his sanity, but because safe to be at large. Still later, plaintiff's action came on for trial, at which time K was either in Chicago or New Jersey. Defendant sought to show that K caused the wreck—an act against which human foresight could not have guarded. *Held*, the presumption must be indulged that K was still insane, and the said oral and written statements were admissible.

EVIDENCE: Presumptions—Continuance of Condition—Insanity. A

6 condition once shown to exist is presumed to continue until the contrary is made to appear by him who asserts such contrary condition. So *held* in case of insanity.

Appeal from Pottawattamie District Court.—A. B. THORNELL,
Judge.

FRIDAY, MARCH 19, 1915.

REHEARING DENIED THURSDAY, APRIL 6, 1916.

ACTION to recover for personal injuries. Defendant appeals.—*Reversed*.

F. W. Sargent, R. J. Bannister and Saunders & Stuart,
for appellant.

Popham & Hawner and Flickinger Bros., for appellee.

GAYNOR, J.—This is an action to recover damages for personal injury claimed to have been sustained by the plaintiff through the negligence of the defendant. There was a trial to a jury, a verdict for the plaintiff, judgment on the verdict, and defendant appeals.

It appears that, on the 20th day of March, 1905, plaintiff was acting as mail clerk in the employ of the United States government, and, as such, was engaged in handling the mail on a mail car attached to and constituting a part of defendant's train. This train was known as the Rocky Mountain Limited, and this particular train, as No. 41; and it was proceeding westward at the time of the alleged accident. Shortly after leaving Homestead, a town on defendant's line, traveling at a speed estimated as high as 65 miles an hour, it left the track, and plaintiff was injured.

The negligence charged against the defendant, upon which plaintiff predicates his right to recover, is that, on said date and at the place where plaintiff was injured, the railway was in a dangerous condition for trains to pass over it, in that the dump and roadbed were defective, the ties rotten, the rails not properly spiked and clamped to the ties or sleepers, the fastenings loose thereon, the earth on the embankment soft and uneven, and the track uneven or low on one side, by reason of which the same was in an unsafe and dangerous condition, and this condition was known to the defendant and defendant's agents at the time, or had existed for such a length of time before the accident that it should have been known to the defendant by the exercise of reasonable care and inspection. It was further claimed that the defendant operated its train at too high a rate of speed, in view of the dangerous condition of the track and roadbed at the place of the accident. The answer was a general denial.

The evidence shows that this was a fast train, if not the fastest on the road. It was composed of the engine and six cars, attached in this order: tender, mail car, combination baggage and smoking car, a sleeping car called Egypt, another sleeper known as Vespasian, a chair car, and a combination sleeper and observation car. The train was made up from the engine to the rear end in the order above given. The plaintiff's run was from West Liberty to Omaha. The engine, tender, mail car, and combination baggage and smoking car

left the track, and were hurled down to the bottom of the embankment. The two sleeping cars left the track, but were left in an upright position part way down the bank. The chair car remained on the top of the dump, but entirely off the track. The combination observation sleeping car was standing with the north wheels of the west trucks on the north rail, and the south wheels off the south rail, and the east trucks on both rails. It appears that the front trucks of the combination observation sleeping car, when it came to a standstill, were 15 feet east of where it is claimed by defendant that the rails became disconnected which dumped the train. The cars had run some distance before they headed down the embankment.

Plaintiff's witness, Hanks, who was in the mail car with the plaintiff at the time of the accident, testifies:

"Next to the chair car was the sleeping car. They were nearly in a straight line headed down the embankment. That night, the car I was in ran for some distance on the ties before it headed down the embankment."

It appears that the embankment was 18 feet across the top and 128 feet wide at the base.

There is evidence that the rail was not out of line on the north side of the track until a point was reached about 33 feet west of where it is claimed by the defendant that the ties were disconnected.

There is no question that, on the night this train was derailed, the plaintiff was in the mail car at the time, and was seriously injured.

The controversy between the parties is as to the cause of this derailment. The plaintiff claims that it was due to the negligence of the defendant, in that it did not make proper inspection of the road at this point, and allowed the roadbed to become in a condition dangerous for trains to pass over it; that the roadbed was defective, the ties rotten, the rails improperly spiked, the fastenings loose, the earth on the embankment soft and uneven, the track uneven and low on

one side; and that this was the cause of the train's derailment.

The defendant claims that the roadbed, ties, rails, spikes and appliances holding them were in good condition immediately preceding the accident; that the south rail of the track, at the place where the injury occurred, was disconnected from the rail just west of it by one Eric Von Kutzlaben; and that the wreck was the result of his wrongful and wicked act in removing the spikes from the ties and disconnecting the two rails within a short time before the train arrived at that point.

These are the two theories upon which the case was submitted to the jury, each theory having some support in the evidence. The jury found for the plaintiff, thus rejecting defendant's theory of the cause of the accident.

This case is not triable *de novo* here, and it is not for us, nor do we assume, to try the case anew upon the facts submitted in this record.

The first proposition that confronts us upon this record is whether or not the plaintiff, at the time of the injury, was, in contemplation of law, a passenger on defendant's train, and, as such, entitled to invoke the rule that

1. CARRIERS: carriage of passengers: "passenger" defined.

has been well recognized in this state and in other jurisdictions, touching the duty of a carrier towards the passengers upon its train.

Upon this point we have to say that we do not understand that the defendant seriously contends that the plaintiff, at the time, did not sustain to the company the relationship of a passenger. However, to entitle him to invoke this rule and to have the benefit of the law regulating the relationship between the carrier and its passengers, it must appear that he sustained that relationship. It is not easy to state a general rule nor to give a definition of the word "passenger" which would embrace all the essential elements. As said in 2 Hutchinson on Carriers (3d Ed.), Sec 997:

"The one usually accepted by the courts, when a definition has been attempted, is that a passenger is 'one who travels in some public conveyance by virtue of a contract, express or

implied, with the carrier, as the payment of fare, or that which is accepted as equivalent therefor.' This definition, however, like all others, is hardly comprehensive enough, for, as a general rule, every person, not an employe, being carried with the express or implied consent of the carrier upon a public conveyance usually employed in the carriage of passengers is presumed to be lawfully upon it as a passenger. There are two main elements in the legal definition of a passenger: first, an undertaking on the part of the person to travel in the conveyance provided by the carrier; and second, an acceptance by the carrier of the person as a passenger. Whether either or both of these elements exist is ordinarily a question for the jury."

Cavin v. Southern P. R. Co., 136 Fed. 592; *Southern P. R. Co. v. Schuyler*, 135 Fed. 1015; *Illinois Cent. R. Co. v. Porter* (Tenn.), 94 S. W. 666.

In the further consideration of this case, we will treat the plaintiff as a passenger upon defendant's train at the time of the accident. It is, therefore, material to know what the reciprocal duties were that arose out of this relationship. It was the duty of the passenger to exercise reasonable care for his own safety; and to this end it must appear affirmatively that he did not, by his own negligence, contribute in any way to the accident complained of. There is an implied undertaking on the part of the defendant to deliver the passenger in safety at his destination, and to this end, the law imposes upon the carrier the duty of exercising the highest degree of care not to expose the passenger to any danger which human care and foresight could reasonably anticipate and provide against, and to exercise the highest degree of care and diligence reasonably consistent with the practical operation of its railroad and the conduct of its business, and if it fails in the discharge of this duty, and injury results, it is chargeable with actionable negligence.

2. CARRIERS: carriage of passengers; negligence; derailment; *res ipsa loquitur*; presumption; sufficiency of explanation.

In the case at bar, the plaintiff was injured by the derailment of the train. A presumption that the defendant failed in the discharge of its duty to the plaintiff arose when this was made to appear.

Of course, in all cases where the action is predicated on negligence, the burden of proof in the first place rests upon the plaintiff; but, as said in *Pershing v. Chicago, B. & Q. R. Co.*, 71 Iowa 561:

"The rule which casts the burden of proof on the carrier is a rule of evidence, having its foundation in considerations of policy. It prescribes the quantum of proof which the passenger is required to produce in making out his case originally, and he is entitled to recover on that proof, unless the carrier can overcome the presumption which arises under the rule from the facts proven."

While the burden rests upon the plaintiff primarily to show a failure of duty on the part of the defendant in respect to the matters charged, and that this failure was the proximate cause of the injury, this burden is sufficiently sustained in the first place when it is shown that the injury was received by reason of the derailment of the train. This makes a prima-facie case for the plaintiff, and casts the burden on the defendant to show that the injury was not the result of any negligence or carelessness on the part of the defendant, and that the accident was such that defendant could not, by human foresight and care, have guarded against it.

This rule has its foundation primarily in common experience, in that such accidents as are here complained of do not usually and ordinarily occur where the duty has been fully performed by the carrier in the equipment and management of its trains and the construction and inspection of its roadbeds. They are, in every sense, extraordinary accidents, and when they do occur, a presumption arises that the carrier has not discharged its full duty; for they do not usually occur when it does. This, however, is not a conclusive presumption, for experience shows that such accidents do some-

times happen, even when the carrier has performed its full legal duty to the passenger, and so the defendant may relieve itself; but the burden rests upon it to show that it was without fault in the matter.

A reference to plaintiff's pleading will show that he charges several acts of negligence on the part of the defendant, which it is claimed resulted in the derailment of the train. As said in *Whittlesey v. Burlington, C. R. & N. R. Co.*, 121 Iowa 597:

"It is true that in an action against a railroad for injuries received by a passenger, resulting from an accident in the operation of a train, which accident is of such a nature that it would not usually happen without negligence, evidence of the happening of the accident and the injury to plaintiff resulting therefrom, is generally held to be *prima facie* sufficient to establish negligence, and to cast on the defendant the burden of proving want of negligence on its part in connection with the accident."

In *Cronk v. Wabash R. Co.*, 123 Iowa 349, a case in which the plaintiff was injured while riding in the caboose of defendant's freight train, by reason of the derailment of the train, this court said:

"It is said that if the jury found the roadbed or rolling stock defective in any one of the 10 or 12 particulars alleged, this cast the burden of the proof upon the defendant to show that it was not negligent, not only as to that one, but as to all of the specifications contained in the petition. It was not incumbent upon the plaintiff, however, in the first instance, to prove any of these defects. Upon proof that the injury of plaintiff resulted from the derailment of the train, the burden of proof shifted, and was cast upon the defendant to show that the accident was not occasioned by any negligence on its part. * * * But appellant insists that, even though it then proves the efficient cause of the accident, under this instruction, it was bound to go farther, and exculpate itself from every other charge of negligence stated in the petition."

The court, in answering this contention of the appellant, held that, when the company established the *cause* of the derailment, and that it was not responsible in any way for the derailment, it had exculpated itself from the charge of negligence. The presumption of negligence arose from the proof of the derailment and accident, and the burden then shifted to the defendant to show that the derailment was due to causes over which it had no control, and against which human foresight could not have guarded.

This pronouncement of the court is to the effect that the burden of proof rests upon the plaintiff, in the first place, to show his right to recover for the injury alleged. Proof on the part of the plaintiff of his injury, and that the injury resulted from the derailment of the train, makes a *prima-facie* case; and then the burden of proof shifts to the defendant to show that the accident was not caused by any negligence on its part; and when it shows the efficient producing cause of the accident, and that this was independent of any negligence on the part of the defendant, and due to a cause for which the defendant was in no way responsible, then by this, it negatives the presumption arising from the *prima-facie* proof, and thereby establishes its freedom from negligence. As in point upon this proposition, see *Gleeson v. Virginia Midland R. Co.*, U. S. Supreme Court, 35 L. Ed. 458. This was an action for damages sustained by a railway postal clerk on defendant's cars by reason of the train's being derailed. The facts in that case, as stated in the opinion, are that plaintiff was a railway postal clerk in the service of the United States; that, in discharge of his official duties, he was making a run from Washington to Danville, in the postal car of the defendant, and over its road; that, in the course of such run, the train was derailed by a landslide which occurred in a railway cut, and the postal car in which the plaintiff was working was thrown from the track, the fireman killed and the engineer seriously injured; that the plaintiff was thrown violently forward by the force of the collision, and also

injured. The defense was that the derailment was caused by rain which had fallen a few hours previously, causing a landslide, and was, therefore, the act of God. Second, that it was a sudden landslide caused by the vibration of the train itself, which no reasonable foresight could have guarded against. The court, after considerable discussion and citation of authorities, makes the following pronouncement:

"The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. * * * When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances. But when the court refuses to so frame the instructions as to present the rule in respect to the *prima-facie* case, * * * it leaves the jury without instructions, to which they are entitled, to aid them in determining what were the facts and causes of the accident, and how far those facts were or were not within the control of the defendant."

The court further in this case said:

"Since the decisions in *Stokes v. Saltonstall*, 38 U. S. (13 Pet.) 181 [10:115], and *New Jersey R. & Transp. Co. v. Pollard*, 89 U. S. (22 Wall.) 341 [22:877], it has been settled law in this court that the happening of an injurious accident is, in passenger cases, *prima-facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance, and

was followed at the present term in *Inland and Seaboard Coasting Co. v. Tolson*, 139 U. S. 551 [35:270]."

See, also, *Illinois Cent. R. Co. v. Porter* (Tenn.), 94 S. W. 666.

From the foregoing, we deduce the following principles: It is the duty of a common carrier of passengers to exercise the highest degree of care in transporting its passengers to their destination. To this end, it is its duty to see that nothing which human foresight could guard against happens in the management and control of its trains, its rolling stock, and roadbed that will imperil the safety of the passenger while being so transported. The derailment of a train does not usually and ordinarily occur when the carrier has discharged this duty. Proof of derailment of a train and injury to the passenger is, therefore, prima-facie evidence that the company has not discharged this duty. This is based upon the thought that such accidents do not ordinarily occur when the carrier has discharged its full duty. This showing, therefore, establishes a failure on the part of the company to perform its duty, and out of this arises the actionable negligence.

Common experience also shows that accidents of this kind do arise when the carrier has done its full duty, but this is unusual and out of the ordinary (when we consider the multitude of trains that are being operated every day as compared with the number of accidents from derailment); so then the law wisely shifts to the defendant the burden of exculpating itself, either by showing that it had done its full duty, and the accident was unavoidable and one that could not be anticipated or guarded against, or that it was the result of some independent intervening cause, over which the defendant had no control and could not have guarded against. Upon such showing, and only upon such showing, is the defendant exculpated.

This proposition involves the rule of *res ipsa loquitur*—the facts speak for themselves. The plaintiff was a passenger.

The defendant owed a duty to the plaintiff to transport him in safety to his destination, and not to omit anything which human foresight could anticipate and guard against for his protection. The train was derailed. This is an unusual and extraordinary fact, one that usually and ordinarily does not happen when the carrier has done its duty. Therefore, the fact of derailment speaks for itself, and says that there has been a neglect of duty on the part of the carrier or this thing would not have happened, and challenges the carrier to negative this by proof that it did not fail in the duty imposed upon it by law, and that the accident was the result of conditions which human foresight could not have anticipated and against which it could not have guarded the passenger.

When a railroad company undertakes the transportation of a passenger, the contract implies that it is provided with a safe and sufficient railroad. See *Philadelphia & Reading R. Co. v. Anderson*, 94 Pa. 351; *Feital v. Middlesex R. Co.*, 109 Mass. 398, in which the court said, in discussing a case similar in its legal aspects to the one under consideration:

"A railroad and its cars are constructed and adjusted to each other with the purpose that, when there is no defect in either, the cars shall remain on the track. The fact that a car runs off is evidence of defect or negligence somewhere; and where the track and the cars are under the exclusive control of the defendants, it has been held evidence of negligence sufficient to charge them, in the absence of any explanation showing that the accident happened without fault on their part," citing *Le Barron v. East Boston Ferry Co.*, 11 Allen (Mass.) 312; *Carpue v. London & Brighton R. Co.*, 5 Q. B. 747. "It is not incumbent upon the plaintiff, after proving an accident which implies negligence, to go farther and show what the particular negligence was, when from the circumstances it is not in his power to do so."

See, also, *Lemon v. Chanslor*, 68 Mo. 340, and cases therein cited. *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181.

No better principles are settled in the law than these.

The cause of an accident may be inferred from circumstances. The law sometimes raises inferences as to the existence of other facts from proven facts; that is, where a fact is proved to exist that could not, in the nature of things, come into existence without an adequate producing cause, the cause may be inferred from the existence of the fact. This, however, is only a presumption or an inference based on common knowledge and experience, and is rebuttable. When an ultimate fact is sought to be established by the proving of other facts, the ultimate fact cannot be considered established unless the facts relied upon are of such a nature and so related to each other that it is the only natural or reasonable conclusion to be drawn therefrom.

It is contended by the defendant, however, that the plaintiff's cause of action is bottomed on negligence—a failure on the part of the defendant to discharge its legal duty to the plaintiff; that, to entitle the plaintiff to recover, it must appear affirmatively that the defendant failed in the discharge of its legal duty, and that this failure was the proximate cause of the injury to the plaintiff; and so it is urged that, when the whole record is made, and the circumstances proved on the trial are as consistent with the conclusion of due care as with the conclusion of negligence, no presumption of negligence can be indulged in; and to support this contention, defendant relies upon *Ashcraft v. Davenport Locomotive Works*, 148 Iowa 420; *O'Connor v. Illinois C. R. Co.*, 83 Iowa 105, 111; *Gandy v. Chicago & N. W. R. Co.*, 30 Iowa 420. These cases are those in which no presumption of negligence arises. They are cases in which the burden rested upon the plaintiff to show not only that the defendant was chargeable with the negligence alleged against it in the petition, but that this negligence was the proximate cause of the injury.

In the case at bar, the proof that the plaintiff was a passenger, that the train was derailed, and that he was injured, is all that the plaintiff is required to show. The burden, therefore, shifted upon the defendant, and these cases

are in point, but against the defendant's contention in this case. The fact that the defendant has introduced evidence tending to show that the accident was due to causes over which it had no control is in rebuttal of the fact presumption created by the law, and it is, therefore, ordinarily for the jury to decide and say whether or not it has exculpated itself from the charge of negligence.

In cases in which the plaintiff seeks to recover for personal injuries, and bases his right to recover on distinct acts of omission or commission on the part of the defendant, and predicates actionable negligence on this, the burden of proof rests upon him to show the negligence charged; and, whether he attempts to do this by circumstantial or direct evidence, it cannot be said that he has done so, unless there is a preponderance of the evidence offered and submitted in his favor upon the question. Where the burden of proof rests upon a party to establish an ultimate fact, it cannot be said to be established unless the evidence of its existence or nonexistence preponderates, and this is true whether the burden rests on the party to establish an affirmative or a negative proposition. Thus, the burden of proof rests upon the plaintiff to establish his own freedom from negligence, and surely it could not be said that he had established his freedom from negligence by a showing that his act was as consistent with want of negligence as it was with negligence. By such showing, he could not claim to be relieved from the legal duty to establish by a preponderance of the evidence the ultimate fact that he did not, by his own negligence, contribute to the injury of which he complains.

In the case at bar, the burden was on the defendant to establish a negative fact, to wit: that it was free from negligence contributing to the conditions out of which the accident arose, and it did not do this by a mere showing that it was just as probable that the injury occurred without negligence on its part as that it was guilty of negligence.

When the relationship of carrier and passenger is shown, and an accident occurs which would not ordinarily have occurred had the defendant discharged its full duty, this proof is evidentiary of the ultimate fact that it did not discharge its full duty, and has probative force in establishing the culpable negligence of the defendant. It is a presumption of fact, inferable and determinable from the fact that, where carriers exercise the highest degree of care in the management and control of their conveyances and in the inspection and maintenance of their roadbeds, these accidents do not ordinarily occur; and, therefore, a mere showing on the part of the defendant that the injury *could* have happened, or probably did happen, without any fault or negligence on its part, or by reason of the intervention of some independent agency over which it had no control, does not, as a matter of law, negative the presumption based upon the prima-facie showing. It leaves it still a question for the jury, and especially is this true when the explanation offered by the defendant, by reason of which it seeks to be relieved of the charge of negligence, is of such a character that men might honestly differ as to what was the real cause of the derailment.

It is true that, if the defendant had proved that the accident was due to a cause over which it had no control, or against which the highest degree of care would not have been availing, and which human foresight could not have anticipated and guarded against, then the defendant would be relieved of responsibility. But the burden is on it to do this before it is relieved, and whether it has done this is a question ordinarily for the jury.

We think that there was no error on the part of the court in refusing to instruct the jury to return a verdict for the defendant on the showing made, and as the record then stood. This disposes of the first three errors assigned for reversal.

But it is contended that there was error committed by the

court in the making of the record. It is contended that there was misconduct of counsel for appellee, prejudicial to appellant, in the opening statement. An examination of the record satisfies us that there is no reversible error on this point.

It is next contended that the court erred in sustaining objections to certain questions asked by the defendant, and in striking out, on plaintiff's motion, answers made to questions asked by the defendant of certain witnesses.

3. EVIDENCE:
opinion evi-
dence: opinions
from observa-
tion: ordinary
witness: law of
necessity:
marks of crow-
bar.

The objections to some of these questions were properly sustained, and to others, the answers properly stricken out, for the reason that in each of these questions the defendant assumed a fact—which is a material fact—without proof of the existence of the fact. As to these questions, instead of asking the witness to detail to the jury what he observed on the ties, their condition, and the impressions there as they were observed, the question assumed (and it was in the line of defendant's contention) that the impression was made by a crowbar; that the marks were made by a crowbar.

In view of the fact that this case must be reversed on other grounds, we do not go into a detailed examination of defendant's contention on this point, but will content ourselves with stating the general rule, and noting a few of the questions which were asked, and objections sustained, which we think constitute prejudicial error.

The witness J. A. Stafford, who claimed to have made an examination of these ties soon after the wreck, testified without objection:

"There was evidence on the track that they (meaning the spikes) had been pulled."

He was then asked this question:

"What do you mean by the evidence on the track that the spikes had been pulled? A. The impression left on the ties of a crowbar having been used. Q. Now, then, when you looked at the ties that morning along the south side of the

rail, did you find any marks on the ties indicating how those spikes had been removed?"

This question was objected to, and objection sustained. In view of the previous testimony, we think this was competent. He was not asked how the spikes were pulled, but whether there were any marks on the ties indicating how they had been removed.

He was then asked this question:

"Now, did you notice any marks on the end of the ties and in connection with the places where the spikes had been drawn or had disappeared from the end of the ties? A. I did see an impression. Q. What marks did you see along there? Tell the jury as plainly as you can. A. Well, it was where a crowbar—you could see where they had been pried out. You could see the impression in the ties where there had been some—had pulled them. Q. Now then, you say that you saw the marks of the crowbar on the tie. Where were the marks of the crowbar with reference to the place where the spikes had been in the tie? (Objected to and sustained.)"

In most instances, the witnesses were permitted to describe to the jury what they saw, the impressions upon the ties as they appeared to them, but were not permitted to state what caused the impression upon the ties. They should have been permitted to say how the impressions, as they observed them there at that time, appeared to have been made. This is a rule of necessity. The best evidence of which a case in its nature is susceptible must be produced and used. It is the only way in which the knowledge of the witnesses as to the ultimate fact, gathered from their inspection and knowledge of the fact, can be brought to the attention of the jury. Some things can be accomplished in many ways. It is often a matter of speculation as to the cause of anything or the manner in which it was accomplished. One who has made an inspection and observation of conditions is in a better position to direct the mind to the primary cause than one who has not had that opportunity. It is not conclusive, but

has probative force. See *State v. Rainsbarger*, 71 Iowa 746, 749; *State of Iowa v. Rutledge*, 135 Iowa 581, 586.

Mr. Lawson, in his treatise on Expert and Opinion Evidence (2d Ed.), and under the head of Opinions from Necessity, p. 513, cites with approval the case of *Graham v. State* (Texas), 13 S. W. 1010, which declares that a nonexpert should be permitted to say that "bruises seem to have been made with a rough, hard substance." The Texas court puts this upon the ground that the statement of an effect produced on the mind "becomes primary evidence, and hence admissible whenever the condition of things is such that it cannot be reproduced and made palpable." See, also, *State v. Hassan*, 149 Iowa 518, 530.

In *State v. Rainsbarger*, *supra*, this court quotes with approval from Mr. Lawson's work on Expert and Opinion Evidence, p. 505, the following:

"The opinions of ordinary witnesses, derived from observation, are admissible in evidence, where, from the nature of the subject under investigation, no better evidence can be obtained, or the facts cannot otherwise be presented to the tribunal," and applies this rule to the *Rainsbarger* case, reference to which is made for the facts to which the rule is applied.

It is the contention of the defendant that the rails at the point where the train was thrown from the track were removed by one Eric Von Kutzlaben, just a short time before the accident.

It appears that, on the 18th day of July, 1907, the defendant undertook to take the testimony of Von Kutzlaben while he was confined in the reformatory at Anamosa, and the attorney for the plaintiff, who was also

4. TRIAL: conduct of counsel: acting for two clients with same interests: misconduct.

attorney for Von Kutzlaben, advised the witness that he was not required to answer questions which tended in any way to incriminate him or to involve him criminally in the charge of having derailed this train, and, upon such advice, the

witness claimed this privilege and declined to answer the questions. This matter, though urged as error, is not argued directly; but an examination of the record fails to indicate any misconduct on the part of counsel which was not consistent with his duty to the witness, to the court and to this defendant.

A stipulation was entered into between the counsel for plaintiff and defendant that the testimony of this witness should be taken before one Edna Hull, a stenographer, the agreement being as follows:

"It is further agreed that Edna Hull, a stenographer, may take such deposition, and that the transcript thereof need not be sworn to nor verified by the witness, but such transcript may be duly certified by said Edna Hull, a stenographer, to the same purpose and effect as though the same were signed and sworn to by the witness."

This was made immediately before the deposition was taken. Thereupon, the following proceedings were had before said notary:

"Q. State your name, age and place of residence. A. My name is Eric Von Kutzlaben. 27. My residence is really Eisnach, Germany. Q. Where are you at present? A. In Anamosa. Q. Are you an inmate of the penitentiary of the state of Iowa located at Anamosa at present? A. Yes. Q. When were you brought here?"

Thereupon, counsel for the plaintiff advised the witness that he was not required to answer, and the witness declined to answer the question. Counsel for plaintiff notified the witness that he was not required to answer any other question that should be propounded to him on the taking of the deposition. It appears that this deposition was being taken in behalf of the defendant. The deposition discloses that the witness, under the direction of the counsel for the plaintiff, refused to answer the following question:

"Were you convicted in the district court of Iowa, in and for Iowa County, for the crime of the murder of one Hotchkiss, which murder was committed by the derailing of

a train on the defendant's road near Homestead on March 21, 1905? (Witness declined to answer.) Q. Were you present or about the train on the track of the Chicago, Rock Island & Pacific Ry. which was derailed at that time and place? Q. Did you not, on or about March 21, 1905, displace the rails on the track of the Chicago, Rock Island & Pacific Ry. at the time and place aforesaid? Q. Did you not, on or about that date, at that place, draw the spikes that secured the rails on defendant's road about one mile west of Homestead on March 21, 1905, and did you not displace the adjoining ends of said rails at said point, and did not, as the result of drawing said spikes and displacing said rails, a wreck occur to passenger No. 41 at that time and place?"

Other questions of like import were asked, and the witness declined to answer, on the suggestion of counsel, as aforesaid.

It appears that Havner was or had been counsel for Von Kutzlaben, defended him on a charge involving the wrecking of this train, and was also counsel for the plaintiff in this suit. It has been said that you cannot serve two masters, but here the interests of the masters were identical. Havner was interested in protecting his client, Von Kutzlaben, from the giving of incriminating evidence. No man is required under the law to incriminate himself. It was not only the right but the duty of counsel to advise his client of his right under the law before he gave the incriminating testimony. This was all that he did, so far as this record shows, and Von Kutzlaben availed himself of his privilege. Had the testimony been taken in open court, it would have been the duty of the court, on request of counsel, to advise the witness that he was not required to give any evidence that would tend to incriminate him, or subject him to a criminal charge in connection with the wrecking of this train. We see no grounds for reversal on this point.

It appears from the record that, on the trial of this case, the defendant offered in evidence a paper, signed by

Eric Von Kutzlaben, and sworn to by him on the 31st day of March, 1905, 10 days after the plaintiff's injuries, as follows:

5. EVIDENCE:
hearsay: ex-
ception: de-
claration
against inter-
est: insanity
of declarant:
law of neces-
sity.

"I, Eric Von Kutzlaben, being first duly sworn, depose and say that I was born in Germany, and that I came to the United States in August, 1903; that I want to tell the whole truth concerning the wreck east of Homestead on the Rock Island Railway; and that I am doing this of my own free will, without fear, intimidation, promise or threats whatsoever. I am the person who caused the wreck. I conceived the plan to wreck this passenger No. 41. I found the wrenches that I used to do so at Homestead about the grain elevator. There is a passageway between the coal shed and the engine room and there I found two wrenches on top of a big timber; one of these wrenches had an iron pipe attached to its handle, but I took the other one without the pipe attached to the handle. I knew where to find these wrenches, as I found them soon after the big snow disappeared, and before I left Homestead. Near the section tool house alongside of the tracks of the Rock Island Railway I found a crowbar between two piles of timber. I did not take it, but left it there. I did not use this crowbar, as I took one from the section tool house at Amana the same night of the wreck, and this was the crowbar I used in committing the act. I used the wrench that I had found at Homestead under the timbers near the coal shed. I took this wrench to take off the nuts off the bolts fastening the plates on the rails. When I met the young man, William Setzer, I threw the crowbar alongside of the tracks, and after he left me I went a short distance south and then came back and got the crowbar. And then went to the big cut where the wreck occurred, and with the wrench unscrewed the bolts fastened to the angle plates and removed the plates and pulled up some of the spikes. I done this shortly before the freight train coming from the west had

passed, and after this freight passed, I took the remaining spikes from the rails. I then spread the rails from where they met about an inch, from the east rail I pulled the spikes from the outside of the rail, and from the west side I pulled the spikes from the inside of the rail, and pried the east rail in a southwestern direction, and the west rail in a northeastern direction. I then took about six pieces of newspaper and covered the rails for about eight feet, this paper extending over the connection of the rails, and I then placed stones alongside of the track on the paper so that the engineer would not discover the rails were out of place. I screwed the nuts back on the bolts after taking off the angle plates, which I threw along the north side of the track. I threw the wrench in the creek near where the train was wrecked. I threw the crowbar at the south side of the east abutment of the bridge, over the small stream directly east, but a short distance of the place of the wreck, and into the same stream I threw the wrench. I then went through the barb wire fence on the south side of the track where the wreck occurred and getting through this fence is where I tore my coat. I then walked about a hundred feet southeast of the fence in the timber and stopped about ten minutes, at which time the wreck occurred. I did not see the train go down the grade. All that I could see was steam coming from the engine. I then went a little west and, leaving the woods, I passed through two gates and onto the track of the Rock Island Railway. On going nearer to the wreck, I discovered that part of the train went down the bank and part did not. I then went up to where the train was wrecked and stood on the roadbed about twenty minutes and saw the fireman. I then went to the mail car and while there I saw the fireman. I remained at the wreck about two hours. I did not enter a car in which there was passengers. I left the wreck about 2:30 A. M. and returned to Amana and retired, and when I got in bed I thought I heard the clock strike four o'clock shortly afterwards."

This statement was objected to by counsel and the objection sustained; and of this, complaint is made.

The defendant also offered evidence tending to show statements made by Von Kutzlaben shortly after the accident, practically in the line of the statements above set out, which were also excluded by the court. On this, the defendant predicates error.

It appears that, after the occurrence of this wreck, Von Kutzlaben was arrested upon a charge of having wrecked the train and causing the death of the engineer; that he was tried upon this charge and convicted; that he appealed to this court and the case was reversed; that, thereafter, and on or about the 30th day of October, 1908, he was adjudged insane and ordered committed to the department for criminal insane at Anamosa until he became sane.

It appears that, on the 19th day of June, 1909, a writ of habeas corpus was sued out on behalf of Von Kutzlaben, and upon a hearing, the following record was made:

"Now, to wit, on this 19th day of June, 1909, the above entitled matter comes on for hearing on the petition for the writ of habeas corpus . . . the court being fully advised in the premises, and it appearing that all the indictments pending against Von Kutzlaben have been heretofore dismissed upon the motion of the county attorney, and it appearing that there is at this time no criminal charge against him, it is hereby ordered and decreed that the defendant in this action has no further right, power, or authority, to detain or imprison the said Von Kutzlaben in the state reformatory, and he is hereby released, and the defendant warden directed to turn him over to the commissioners of insanity to take such action as they deem best."

It appears that this was accordingly done, and the following proceedings had before the commissioners of insanity in and for Jones County:

"Now, to wit, on this 19th day of June, 1909, the said

Von Kutzlaben having been turned over to the board under the order of the court to be dealt with as in our judgment seems best, we hereby find that the mental condition of the said Von Kutzlaben is such that it is safe to the public that he be discharged, upon the condition that he be delivered into the custody of his mother, and that R. G. Popham is empowered to take charge of him and accompany him to the city of Chicago, Illinois, for the purpose of delivering him to the custody of his mother."

This order was signed by the commissioners of insanity for Jones County.

It appears that the present trial was commenced in the month of February, 1910. At the time of the hearing of this case from which the appeal was taken, the defendant was at large, residing either in Chicago or somewhere in New Jersey. It does not appear definitely in the record.

There is no evidence showing that the insanity of Von Kutzlaben was judicially determined prior to October, 1908. On that date, upon an inquisition instituted for the purpose of ascertaining his sanity, under Section 5540, Code, 1897, he was determined to be insane, and, based upon this verdict it was ordered and adjudged by the court that the discharge of the defendant at this time would endanger the public safety, and he was, therefore, ordered committed to the department for the criminal insane at Anamosa until he became sane. The presumption of law is that a condition

shown to exist continues until the contrary appears. Where it is shown that a party at a given time is insane, this condition will be presumed to continue until the contrary

is shown. There was no finding after this in which Von Kutzlaben was adjudged to have recovered from his insanity. The only finding touching the mental condition of Von Kutzlaben was on the 19th day of June, 1909, in which it was found, not that he had recovered his sanity, but that his mental con-

6. EVIDENCE: pre-
sumptions:
continuance of
condition: in-
sanity.

dition is such "that it is safe for the public that he be discharged," and he was accordingly discharged.

There is no evidence that he was insane at the time that he made the statements offered in evidence, and there is no evidence that he was insane at the time that the defendant undertook to take his depositions in July, 1907. Having been adjudged to be insane upon an inquisition made by a proper tribunal, we must, in the consideration of this case, assume that he was insane at the time of the trial, nothing to the contrary appearing. A condition shown to exist is presumed to continue until the contrary appears. As said in 2 Chamberlayne on the Modern Law of Evidence, Sec. 1043:

"If a person has been adjudged insane, the presumption of insanity continues until the adjudication of restoration to reason has been made, and where the issue is as to whether reason has been restored, the burden is upon the party who alleges such restoration to reason, to establish it by a preponderance of the evidence."

See, also, *Tiffany v. Tiffany*, 84 Iowa 122; *Ockendon v. Barnes*, 43 Iowa 615.

When these written and verbal declarations of Von Kutzlaben were offered in evidence, the plaintiff objected to them on the ground that they were incompetent and hearsay. This objection was by the court sustained.

There are, however, well-known exceptions to the rule excluding hearsay testimony. Declarations of a person, whether verbal or written, as to facts relevant to the matter under consideration are admissible in evidence, even between third persons, where it appears: (1) That the declarant is dead; (2) that the declaration was against his pecuniary or proprietary interests; (3) that he had competent knowledge of the facts declared; (4) that he had no probable motive to falsify the fact.

The first showing required to meet the exception is that the declarant is dead. The declaration is then admitted on

the ground that he could not be produced in court to testify to the fact declared upon.

The second ground of the exception is that, at the time the statement was made, it was against his interests to make the statement. This second ground is founded upon a knowledge of human nature, that men do not, usually and ordinarily, speak against their own interests, while very often they are free to speak in their own favor. It is based on the thought that courts can safely trust the man who speaks against himself, and the law substitutes this for the sanction of a judicial oath. The usual tests of credibility are the judicial oath administered and a cross-examination of the witness. The admissions of such declarations rest upon the improbability of a man's admitting as true what he knows to be false, against his own interest. The common law has always regarded the concurrence of these things as a perfectly safe test for ascertaining the truth in all judicial proceedings.

The weight of judicial authority, numerically considered, requires the showing of the first ground of exception to the hearsay rule, before the declaration can be admitted, to wit, that the party whose declaration is offered is dead. Every rule ought to be as broad as the reason upon which it rests. Proof of death establishes the impossibility of producing the declarant upon the trial. To the writer of this opinion, it would seem that a showing that the defendant was intellectually dead—insane—and therefore incapable of being produced as a competent witness, and incapable of testifying because of such insanity, would meet the requirements of the first ground of the exception, and the only reason apparent why courts have rejected proof of insanity as a foundation for the introduction of a declaration made when the party was sane is that there is some uncertainty as to whether the person is insane or not at a particular time. It is a matter not susceptible of exact and definite proof. It may be feigned or assumed for the very purpose of making his declaration competent as against a third party; and further, there must

be an inquisition into the sanity of the party before the declaration is admitted in evidence, and this would require the trial of a distinct issue and an affirmative finding as a basis for the introduction of the statement. We have not been able to find any substantial reason given in the books why the law should make death the *only* test before the statement is admitted.

Mr. Wigmore, in his work on Evidence, Vol. 2, Sec. 1456, states that this exception to hearsay evidence is based upon necessity. The necessity principle, as here applied, signifies the impossibility of obtaining other evidence from the same source, the declarant being unavailable in person on the stand; and he would enlarge the rule to cover insanity as being within the reason of the rule. He says:

"Whenever the witness is practically unavailable, his statements should be received. Death is universally conceded to be sufficient."

He says, however:

"The principle of necessity is broad enough to assimilate other causes; but the rulings upon other causes than death are few. . . . Illness and insanity should be legally sufficient to admit the statements."

County of Mahaska v. Ingalls, 16 Iowa 81, was a case in which a suit was brought by the plaintiff county upon a county treasurer's bond, and the treasurer sought to show that the defalcation occurred prior to the execution of the bond, and, to establish this fact, called one White to testify to a conversation had with one Shoemake, who was treasurer of the county prior to that time, but who, at the time of the trial was dead; and over the objection, the witness was permitted to testify:

"Mr. Shoemake told me that there was over \$2,000 in the summer of 1858, that he was behind as treasurer of the county, and he wanted an arrangement made by which I should pay it."

Judge Dillon, speaking for this court in the foregoing case, said:

"The reception of verbal admissions against his interest, and where the declarant is dead, is supported by the following cases (citing cases). . . . Our examination and survey of this subject may thus be summed up. This species of evidence being somewhat anomalous in its character, and standing on the *ultima thule* of competent testimony, is not highly favored by the courts, and the tendency is rather to restrict than to enlarge the right to receive it, or at least to require the evidence to be brought *clearly* within *all* the conditions requisite for its reception. From the unbroken current of English and the decided preponderance of American authority, we think the present state of the law is that verbal declarations are receivable, when accompanied by the following prerequisites: 1st. The declarant must be *dead*. To this we believe the English cases make no exception. Mere absence from the jurisdiction will not answer. *Brewster v. Doane*, 2 Hill (N. Y.) 537, and cases; *Moore v. Andrews*, 5 Port. (Ala.) 107. Although by the course of decisions in some of the states, with reference to written entries, etc., absence might possibly be treated as equivalent to death. See 1 Greenleaf on Evidence, Sec. 163, and note; 8 Watts, 77; 2 Smith, L. Cas. 340 (top); as to insanity, *Union Bank v. Knapp*, 3 Pick. (Mass.), 96. As, in the case at bar, the declarant was deceased, we need not decide whether *death* is, in all cases, an indispensable condition. We need only say that probably the courts would not be inclined to relax the rule so as to dispense with this condition, unless it might be in the case of confirmed insanity. 2d. The next prerequisite is that the declaration must have been *against the interest* of the declarant at the time, and that interest must be a *pecuniary* one. That it would have subjected the party to penal consequences is not sufficient, although this would add to the weight of the testimony. (*Davis v. Lloyd*, 1 C. & K. 275; 11 Cl. &

Fin. 85.) The conflict of the declaration with the pecuniary interest of the party must be *clear and undoubted*, as this is the main ground upon which the admissibility of this species of evidence rests. 3d. The declaration must be of a *fact* or *facts* in relation to a matter concerning which the declarant was *immediately* and personally cognizable."

Judge Dillon further said:

"Under the guidance of these principles, as applied to the case at bar, considering the nature of the admissions as being indisputably against the declarant's pecuniary interest, and involving disgrace, if not crime, the time of the admission being not only *ante litem motam*, but before the execution of the bond in suit; the absence of all conceivable motive to falsify; and the impracticability of procuring other evidence touching the same matters, the court are of opinion that the evidence . . . was properly received."

Upon an examination of our own decisions, we find the opinion of Judge Dillon quoted with approval. See *Ellis v. Newell*, 120 Iowa 71; *Moehn v. Moehn*, 105 Iowa 710. It is also cited with approval in *Smith v. Hanson* (Utah), 18 L. R. A. (N. S.) 520.

Mr. Wigmore, in his work on Evidence, Vol. 2, Sec. 1476, says that in his judgment the doctrine should be extended to include penal interests and all declarations of fact against the interest of the deceased person. He, however, concedes that the cases have limited the admissibility of the declaration to a pecuniary or proprietary interest at the time made, and our examination satisfies us that the weight of authority is to the effect that, to make such declarations admissible, it must appear that the party making them is incapable of testifying at the time when the declarations are offered, because of his insanity; and that, at the time they were made, they were against his pecuniary or proprietary interest, and were of such a nature as to affect his interests in that respect.

As in accord with the rule laid down by Judge Dillon,

see *Peck v. Gülder*, 20 N. C. 249; *Smith v. Moore*, 142 N. C. 277 (7 L. R. A. [N. S.] 684); also, 1 Elliott on Evidence, Sec. 436, in which it is said:

“Declarations made by persons who possessed peculiar means of knowing the matter stated, and had no interest to misrepresent it, are admissible in evidence, when pertinent and relevant, whether made orally or in writing, provided, first, that the declarant is dead, and secondly, that such declarations were opposed to the declarant’s pecuniary or proprietary interest. They embrace entries in books, and all other written or oral declarations of facts made under the above conditions.”

See *Bowen v. Chase*, 98 U. S. 254; *Georgia R. Co. v. Fitzgerald*, 108 Ga. 507; 2 Smith, Leading Cases, 331; *Taylor v. Gould*, 57 Pa. St. 152; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; *Bartlett v. Patton*, 33 W. Va. 71; *Friberg v. Donovan*, 23 Ill. App. 58; *Hinkley v. Davis*, 6 N. H. 210; *Heidenheimer v. Johnson*, 76 Tex. 200; *Quinby v. Ayres* (Neb.), 95 N. W. 464; *Dixon v. Union Iron Works* (Minn.), 97 N. W. 375.

Nearly all the cases that we have examined are cases in which the declarant was dead at the time the declaration was offered. In those cases, it was not necessary for the court to go beyond the record made in determining whether insanity was or was not a ground for admitting the declaration; and this was true in the case of *Mahaska County v. Ingalls*, *supra*, and Judge Dillon so states. See *Halvorsen v. Moon & Kerr Lumber Co.* (Minn.), 94 Am. St. 669. Special attention is called to the note on page 673, and citation of cases in support of the text as reported therein. This case will also be found in 91 N. W., at 28, and 87 Minn. 18.

In a few cases that have reached the courts, declarations have been offered and admitted where the party was not dead at the time the offer was made. In *Griffith v. Sauls* (Texas), 14 S. W. 230, we find one of these cases. It was shown that the declarant’s physical condition was such that his deposition could not be taken. He could not undergo oral

examination on the stand. He was very old and had lost his power of speech. His declaration was held to be competent, the court saying:

"If Avery had been dead, there could be no question as to the admissibility of his statements about which the witnesses testified, and this would be so because of the inability to produce the witness. If the party whose statements would be admissible if he were dead, from advanced age or other irremediable cause, has lost the power of speech and the ability to testify, either orally or by deposition, what good would it do to produce him? In what would he be better than a dead man in so far as the production of his testimony is concerned? We think the circumstances and condition of Avery, as shown by the record, furnish as satisfactory a reason for admitting his statements as proof of his death would afford."

It is not necessary to go to that length in this case.

Eothrock v. Gallaher, 91 Pa. (10 Norris) 108, was an action in which they sought to show the declarations of a party who, from the consequences of ill health and age, had lost his memory. It is true in this case that the witness had previously testified. This testimony, as taken at a former trial, was offered in evidence, although he was present in the court at the time. The court said:

"If he had been dead, . . . it is clear this evidence would have been admissible," citing cases. "We cannot see any substantial reason why the testimony of a witness once duly taken in a pending cause, may not afterwards be read in evidence in another cause between the same parties in regard to the same subject-matter, when in the interval the witness has lost his memory by reason of old age and ill health. The justice and propriety of receiving the evidence are as strong as if the witness were dead, insane . . ., or unable to attend by reason of sickness. Although bodily present, yet if shown to have become so bereft of memory by senility or sickness that he is unable to recall a past transaction to which he had once testified, and has forgotten that he ever testified

in regard to it, he may be considered as practically absent, and his former testimony, if otherwise admissible, may be read in evidence," citing 1 Greenleaf on Evidence, Sec. 163; *Jack v. Woods*, 5 Casey (Pa.) 375; *Emig v. Diehl*, 26 P. F. Smith (Pa.) 359; see also *Harriman v. Brown*, 8 Leigh (Va.) 697.

It was also held, in *Cook v. Stout*, 47 Ill. 530, that, where a witness had died or become insane after his evidence had been taken, it is permissible to prove, as between the same parties, what such witness testified to on the former trial.

It appears that, under the English common law, the court seldom, if ever, admitted the testimony of a witness given on a former trial, except in case of death, placing it practically on the same ground as the declaration of a party made against interest. English courts have modified this, however, and it is thus stated in Stephen on Evidence, Art. 32:

"Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding, or in a later stage of the same proceeding, when the witness is dead, or is mad, or so ill that he will probably never be able to travel, or is kept out of the way by the adverse party. or in civil, but not, it seems, in criminal cases, is out of the jurisdiction of the court, or perhaps in civil, but not in criminal cases, when he cannot be found."

This goes to the extreme.

As said by Jones in his work on Evidence, Vol. 2, at 791:

"There has been considerable conflict in the United States as to how far the ancient rule has been relaxed. There can be but little doubt that in this country the rule has been so far modified as to admit such testimony in at least four cases: first, where the witness is dead; second, where he is insane or mentally incompetent; third, where he is beyond the seas; fourth, where he has been kept away by the contrivance of the opposite party."

Jones, in his work on Evidence, Vol. 2, p. 753, discussing this question now under consideration, says:

"It is not enough to warrant the admission of declarations

against interest that the person who made them cannot be produced as a witness. His death must be shown" (citing *Hart v. Kendall*, 82 Ala. 144; *Fitch v. Chapman*, 10 Conn. 8; *Chandler v. Mutual Life of Georgia*, 131 Ga. 82; *Doe v. Evans*, 8 Blackf. [Ind.] 322; *Mahaska County v. Ingalls*, *supra*, and other cases), "or what, for this purpose, is regarded as the equivalent, that he is legally unavailable, . . . being mentally incapable from giving testimony," citing *Griffith v. Sauls*, 77 Texas 630.

It is also noted that Judge Dillon, in the *Mahaska* case, *supra*, said:

"As in the case at bar, the declarant was deceased. We need not decide whether *death* is, in all cases, an indispensable condition. We need only say that probably the courts would not be inclined to relax the rule so as to dispense with this condition, unless it might be in the case of confirmed insanity."

In the administration of public justice, the truth as to the existence or nonexistence of a fact material to be known must be ascertained, if possible. To this end, the courts have demanded that the best evidence of which the case in its nature is susceptible must always be produced. Therefore, when it is shown that a person had knowledge of a material fact, but cannot be produced because of conditions over which neither he nor the persons desiring his presence had control, the courts have held that his oral or written declaration of and concerning the fact may be received in evidence, provided it is shown that, at the time that he made the declaration, he had no motive to falsify. To insure this, the courts have provided, as a test of truth, that the declaration, when made, was against his interest at the time that it was made. This test of truth is bottomed on the knowledge of men—that they do not usually speak to their own hurt. A further test is that the interest affected by the declaration must be personal, certain, and involve interests pecuniary or proprietary.

In case of confessions of crime committed, made by others than defendant, where the interest affected is not certain,

involves no certainty of earthly punishment, and is held to be hearsay, the declaration could be made, signed and delivered with the distinct understanding that it should not be used until after the declarant's death. Thus, in such cases, courts have excluded declarations or confessions of a stranger that he committed the crime, when these were made in contemplation of immediate dissolution, sometimes called deathbed confessions. *Snow v. State*, 54 Ala. 138; *Green v. State* (Ind.), 57 N. E. 637; *Davis v. Commonwealth* (Ky.), 23 S. W. 585; *Farrell v. Weitz* (Mass.), 35 N. E. 783; *Mays v. State* (Neb.), 101 N. W. 979; *Hodge v. State* (Tex.), 64 S. W. 242; *People v. Hall* (Cal.), 30 Pac. 7; Elliott on Evidence, Vol. 1, p. 441.

Halvorsen v. Moon & Kerr Lumber Co., 87 Minn. 18 (91 N. W. 28), was an action to recover damages for the burning of a building, it being charged that the burning was due to defendant's negligence. Defendant offered to prove by a witness on the stand that one George Schlink stated to him, shortly after the fire, that he was in the burned building on the day, trying lard in the sausage room. When the alarm of fire was given (that is, the fire that it is claimed spread to and destroyed plaintiff's building), he left the boiling kettle and went out to see the mill fire, and when he returned, the kettle had boiled over and set the room and building on fire. This was rejected by the court. The court said:

"Confessedly the evidence was hearsay, but it falls within a necessary and established exception to the general rule excluding hearsay. The exception is this: Declarations, whether verbal or written, made by a deceased person as to facts presumably within his knowledge, if relevant to the matter of inquiry, are admissible in evidence as between third parties when it appears," then citing the general rule heretofore stated.

The court then proceeds to say:

"There is no controversy as to the first condition, for it was admitted on the trial that the declarant was dead. The plaintiff claims . . . that the declaration in question was

not against the pecuniary interest of the declarant. We are of the opinion that the facts claimed to have been admitted by him, taken in connection with the fact that he had charge of the sausage room, are the basis of a pecuniary claim against him on the grounds of his negligence."

See, also, *Griffith v. Sauls*, *supra*.

Elliott on Evidence, Vol. 1, Chapter 20, Section 441, says:

"Another limitation upon such declaration is that the declaration must be against the pecuniary or proprietary interest of the person making it. A statement is against the pecuniary interest when it tends to lessen the pecuniary value of property of the declarant, or imposes upon him pecuniary responsibility."

Judge Dillon, in *Mahaska County v. Ingalls*, 16 Iowa 86, in speaking of the declarations made and why they were admissible under the rule, said:

"They were made against the pecuniary interest of the declarant, for they were of such a nature, so circumstantial and precise, as to constitute in an action against him by the plaintiff, the foundation and evidence of a legal liability to that extent. They involved, moreover, the admission of conduct, on his part, which would render him, if known, infamous in the eyes of the public, and criminal in the eyes of the law; for the penal statutes of the state declare that every officer who shall unlawfully 'take, convert, invest, use, loan, or fail to account for, any portion of the public money entrusted to him, shall be imprisoned in the penitentiary, fined in a sum equal to the amount embezzled, and be also disqualified from holding any office under the laws or Constitution of the state.'"

The record in this case discloses that, after the making of this declaration offered in evidence, and prior to the time of the trial, the defendant had been adjudged insane. There is no evidence that he had recovered from his malady. He was presumed to be insane at the time of the trial. The declarations were made against his pecuniary interest; for

they were of such a nature as to constitute the basis of an action against him for damages, as well as to expose him to a criminal prosecution.

Jones, in his Commentaries on the Law of Evidence, Vol. 2, Sec. 324, says:

"Although most of the cases illustrating the rule are those in which the declarations related to the payment of money, the rule has been frequently declared where other issues were involved, and when the effect of the declaration would be to furnish evidence of facts which could be made the basis of a pecuniary claim against declarant," citing *Halvorsen v. Moon & Kerr Lumber Co.*, *supra*; *State v. Alcorn*, 7 Idaho 599; *Walker v. Brantner*, 59 Kas. 117; *Georgia R. & B. Co. v. Fitzgerald*, 108 Ga. 507.

We do not want to be understood here as extending the rule in the exception to hearsay evidence, heretofore referred to, beyond the record in this case. Nor do we want to be understood as extending the rule, as suggested, in the cases hereinbefore cited; but we do say that the record in this case shows that Von Kutzlaben was judicially determined to be insane, prior to the time that his declaration was offered in evidence; that there was no showing that he had recovered from his insanity; and that the presumption continues that he is insane at this time. We must not be understood as holding that, under a different showing of facts from what appears in this record, this declaration must be admitted upon a retrial. We simply hold that the rule requiring the showing that the declarant is dead may be extended to cover cases where it is shown that he is insane and incapable of being produced as a witness and of giving testimony upon the trial; and beyond this, we do not care to go at this time.

For the error in refusing to admit these declarations under the record as made, we think the case ought to be reversed.—*Reversed.*

EVANS, C. J., LADD and SALINGER, JJ., concur.

SALINGER, J. (Concurring). The dissent of my brothers Deemer and Preston has impelled me to state why I concur in so much of the opinion as holds that, under some conditions, insanity is as much the basis for admitting hearsay as is death.

On March 31, 1905, one Von Kutzlaben signed and swore to a declaration, in effect, that he derailed the train whose wrecking injured plaintiff. About October 30, 1908, upon a verdict in an inquisition under Sec. 5541, which determined that he was insane, he was ordered confined in the department for the criminal insane at Anamosa, to be there detained until he became sane. So far as the verdict goes, there was a finding of general insanity. But the order upon the verdict recites that he is committed because his discharge then would endanger the public safety. Still later, an order in habeas corpus released him from the reformatory, and directed that he be surrendered to the Jones County commission of insanity, for such action as it deemed proper. This order proceeds on the expressed ground that no criminal charges are then pending against him, and that, therefore, there was no further right or power to detain him in the reformatory.

Said commission found his mental condition to be:

"It is safe to the public that he be discharged upon the condition that he be delivered into the custody of his mother, and that R. G. Popham is empowered to take charge of him and accompany him to the city of Chicago, Illinois, for the purpose of delivering him to the custody of his mother."

At the time of the trial now on review, had in February, 1910, he was at large, residing either in Chicago or somewhere in New Jersey. His declaration was rejected as hearsay. Our differences of opinion do not touch four propositions: (1) Whatsoever condition said inquisition does establish is presumed to continue. (2) Whenever it becomes necessary to show that this condition has ceased to exist, the burden is upon him who asserts such cessation. (3) Other than the order made by the commission of insanity, there was no release and

no finding or other evidence of recovery. (4) Had it been proved on this trial that Von Kutzleben was dead, then one of the conditions required to make said declaration admissible, would have existed. Thus, the dividing line between us is clear. On the one hand, it is held that his insanity at the time that his said declaration was rejected was still such as that the same reason for admitting it existed as if he were then dead; on the other hand, that his insanity was not confirmed and general, and that, even if it were, the case is not within the exception which is applied when the declarant is dead.

It does not prove the soundness of a position that the arguments advanced against it are untenable. But here, the ones advanced by the minority come so near to being all that can be said for the claim that death alone makes such a declaration admissible as that whatever demonstrates that such arguments are unsound disproves the position that such arguments seek to maintain.

It will conduce to clarity in treatment to eliminate some matters which should be absolutely conceded, and others which are conceded but may be avoided.

I. (a) The majority is not sustained by cases wherein the declarant was dead, though they do intimate that insanity is a basis which is equivalent to death.

(b) The views of the majority are not sustained by cases which, upon a showing of either death or insanity, admit a transcript of testimony given by the incompetent upon another trial.

II. So far as case law and text writers are concerned, the majority has no support except one decided case which supports it squarely, one other decision which, while holding as the majority does, weakens itself by putting absence from the jurisdiction, and the like, into the same class with total insanity, and Mr. Wigmore on Evidence (Vol. 2, Sec. 1456). *Mahaska County v. Ingalls*, 16 Iowa 81, in holding that the rule should not be enlarged, intimates that it might be

"in the case of confirmed insanity." As the declarant was dead, this is not a *decision* of the point now mooted. But, at the least, it leaves the question open in Iowa and creates an atmosphere favorable to relaxing the rule enough to include confirmed insanity. No other Iowa case has foreclosed either the majority or the minority. It cannot be claimed that, if numbers make weight of authority, the majority opinion is in accordance with such weight. But it has not always been the policy in this court to make its view on open questions depend upon counting the number of the cases on each side of the question. It would be difficult to find a case more in conflict with the decisions in all jurisdictions than that of *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752; and, so far as I am advised, the doctrine of that case has been adhered to by us steadily, although the numerical weight of authority against it has been steadily maintained. Nothing in the subject-matter of *Mentzer's* case furnishes a special reason why it should be pronounced or adhered to against numbers. A rule that damages for negligence in delivering a telegram may be recovered for mental suffering without bodily injury is as to this in no different position from a rule of evidence that insanity equals death as a basis for admitting hearsay. As to following numbers, there is no difference between rules of evidence and rules as to what damages are recoverable. It is true, but, as I view it, not material, that rules of evidence were made and adhered to before the telegram was discovered. Any contention that, because telegraphy is a modern thing, cases opposed to the rule of the *Mentzer* case do not count in testing weight of authority must meet the fact that both the *Mentzer* case and the cases in opposition to it deal with the law of negligence as applied to the delivery of telegrams. Just how a difference resting on before and after the discovery of the telegraph can make a distinction between cases, when all of them were decided after the discovery, I am unable to see. This is no intimation that the *Mentzer* case is not rightly decided, but is a statement that a minority in cases may be right, and

that a decision on an open question is not shown to be wrong by a naked showing that it is not as numerously supported by decided cases as is the contrary view.

It may be noted, in passing, that here, as in many other lines of decisions, numerical weight is more often evidence of a desire to shirk labor than of being controlled by the weight of reasoning. A tracing down of the lines of decisions more numerous indicates quite strongly that the leaders merely declared what is manifestly sound, to wit, that death was a basis for applying this exception. Others therefrom argued, or said by way of dictum, that death was the only basis. After these careless decisions became so numerous as to be very easy to find, other careless writers followed, without investigation of whether what was followed was really authority for holding that death was the exclusive basis.

III. While the order of commitment declares that Von Kutzlaben could not then be discharged without danger to the public, the verdict on the inquisition upon which this order is founded seems to have been without limitations, and, hence, a finding of total insanity. There is no finding or other evidence that there was either a total or even a partial recovery. All that there is is an order releasing from Anamosa because no prosecutions remained pending, and a subsequent placing of Von Kutzlaben in the hands of custodians. Hence, by presumption, it appeared at this trial that Von Kutzlaben was still totally insane. Concede that the test is whether the declarant is competent to take an oath, why is not a showing that one whose declaration is offered is then totally insane evidence that he should not be sworn?

IV. Whether the insanity was so confirmed as that Von Kutzlaben could never testify seems to be an irrelevant inquiry. The only question is, Was he competent when his declaration was offered? If, though then totally insane, his declaration is rejected, subsequent recovery has no effect one way or another. It must be assumed that, had the declaration been received instead of being rejected, it might have won the lost

suit. How does it affect the matter, after a cause is lost by excluding a declaration which should have been admitted because the declarant was too insane to be a witness, that, later, he becomes competent to testify? Unlike sickness or the like, there is no way of making subsequent recovery material. One could not ask a continuance on the ground that a witness was a total or confirmed lunatic. There would be no way of fixing the duration of the continuance—no way of giving an assurance when the condition of the witness would change, or even, at what time it was reasonably expected that a change would take place.

V. Admit that receiving such declaration is an affirmative finding that the declarant is then incompetent, and that such finding is the basis for admitting the declaration, and it does not prove the objection that, so, a collateral inquiry is improperly injected. It may be collateral; but if so, every preliminary inquiry as to whether a proposed witness understands the obligation of an oath is equally so. Neither is it persuasive that whether a proposed witness has capacity to understand the nature of an oath can only be determined by the trial court before whom it is proposed to introduce his testimony, and that this cannot be determined until he is called to give evidence in some case.

No good reason appears why, if the competency of a witness properly becomes the subject of inquiry, it cannot be pursued unless the living witness is offered at the trial, and the matter determined then and there. Whether the witness be or be not present, and no matter how the question arises, it should suffice that the court which is asked to receive his evidence determines its admissibility by using the methods usual in judicial decisions. Here is a declaration offered. It is admissible, say, if the declarant be insane, and not admissible if he is competent to be sworn. The declarant is not in court. Why may not the question of admissibility be as much inquired into as though the question arose on the proposal of a witness who was present? If not, then there is no way of

testing whether one whose deposition is offered is a competent witness, except by losing the use of the deposition, for the deposition is not receivable if the deponent be in court. And death, concededly a sufficient basis, could not be shown, unless the corpse were present at the time that the declaration of the deceased was offered.

VI. A holding that complete insanity of declarant at the time his declaration is offered makes the declaration competent, is not a decision that all things which prevent or make inconvenient the using of the declarant as a witness have the same effect. The vital difference is (1) that absence from the jurisdiction or asserting privilege, and the like, may be the basis of a motion for continuance, and (2) that such are created by voluntary act, and, hence, might be made a method of forcing the admission of such declarations. Manifestly, collusion cannot create total insanity. To be sure, insanity may be feigned. But that question is also part of the inquiry. And this possibility is only one illustration that the machinery of the law is not an absolute guaranty against mistake. Death may be feigned. Witnesses may be deceived by a state of catalepsy. They may assert death, falsely. The dead body of declarant is not brought into court. Death, the conceded basis for admitting the declaration, is itself found by methods that may fail to obtain the actual truth.

VII. Still following out the line of thought that the important question is not whether insanity shall admit such declarations, but that there is great danger that the basis will not be sufficiently proved, the point is made that the rejection of the declaration amounts to a finding of fact, conclusive here, that no sufficient insanity existed. The rejection was put upon the express ground that the declaration was hearsay. It is hearsay whether the foundation of insanity was or was not proved. It follows, therefore, that the rejection did not involve a decision on whether the foundation was sufficient. Had the court expressly rejected the declaration

on account of insufficient foundation, a different question would arise.

VIII. An attempt of defendant to obtain the deposition of Von Kutzlaben failed, because he pleaded privilege. It is suggested by the minority that his declaration should now be rejected because inability to get his testimony is not due to insanity, but to that plea of privilege. The offer of his declaration does not rest on the fact that he at one time refused to answer, but on the claim that said declaration should now be available because at the time of offer he was insane. Had Von Kutzlaben been dead at the time that his declaration was offered, would the minority contend that the declaration was inadmissible, because at one time the declarant had refused to be interrogated as a witness? If such earlier plea of privilege would not shut out the declaration with death as a basis, then on any reasoning which makes insanity the equivalent of death, such plea of privilege would not bar the admission where insanity is a basis.

IX. It is conceded that the declaration of Von Kutzlaben was admissible had there been testimony that he was dead at the time the declaration was offered. Why should the same declaration be rejected despite undisputed testimony that he was at said time totally insane? The exception which admits hearsay because there has been a death has for its foundation that the death has made better testimony impossible, that the ascertaining of truth is the desideratum in all judicial inquiry, and that, rather than fail in attaining the truth, inferior evidence shall be received if, by reason of death, such testimony is the best obtainable. In a case where it is *conceded* that the declarant is totally insane when his declaration is offered, every condition is present upon which rests admitting such declaration on account of death. While declarant is totally insane, better testimony can no more be obtained than if he were dead. It becomes apparent, then, that the minority does not really assert that insanity can never be a basis for

admitting hearsay. It does not claim that a complete lunatic is more available for ordinary testimony than is a corpse. On analysis, its argument makes the point that there is more difficulty in being sure of total insanity than of death. Be that so, it but establishes that there should be greater care in accepting insanity as the basis for admitting such testimony. That, however, is no reason for rejecting it as a basis if it has been clearly shown to exist. There is nothing said or to be said in opposition, except that in finding this insanity there may have been error, or that the court may have been deceived. As said before, that is no more true of ascertaining mental condition than of a multitude of other things the judiciary must ascertain as a foundation for decisions.

It is said in *Fish v. Poorman*, 85 Kas. 237, 243 (116 Pac. 898), and in 1 Wigmore on Evidence, § 578, that the tendency is towards the reception rather than the rejection of evidence, experience having shown that more harm results from its exclusion than from its admission.

This is quoted with approval in the remarkably able opinion in *Thurston v. Fritz*, 91 Kas., at 475, and the essence of this branch of this discussion cannot be stated better than is done by Mr. Justice West in writing that opinion:

"We are confronted with a restrictive rule of evidence commendable only for its age, its respectability resting solely upon a habit of judicial recognition, formed without reason and continued without justification."

And his further statement, in effect, that a rule should be abrogated when the reason for it has perished, may well be amplified by saying that no rule should survive beyond the moment at which it is perceived that no logical reason for it ever did exist.

X. As I read it, the decision of the Supreme Court of the United States in *Drew, Sheriff, v. Thaw* (N. H.), 235 U. S. 432, is not in conflict with these views. It does not determine that insanity may not be so complete as that the incompetent cannot be guilty of participating in a criminal con-

spiracy, but that whether he is so insane is for the state court, on defense to the charge.

XI. There seems to me to be little occasion for adding anything in support of that part of the opinion which holds that the Von Kutzlaben declaration met the condition that it be against pecuniary interest. If it was ever law that such a one is not against such interest, I do not think it is or should be law now. If a declaration may be assumed to be true because its making will cost the declarant a hundred dollars, the same assumption is warranted where the statement may cost life or liberty. Be that as it may, this declaration made Von Kutzlaben liable in damages and, hence, meets the test in any view.

PRESTON, J. (Dissenting). I dissent as to that part of the opinion holding that the declarations and confession of Von Kutzlaben are competent.

Though insane, a person may be a competent witness if he has sufficient capacity to understand the obligation of an oath. 7 Encyc. of Evidence, p. 479; Code Section 4601. Suppose on the next trial of this case, Von Kutzlaben, though insane, is produced in court and placed upon the stand; upon preliminary examination as to his competency, it appears that he is competent to understand the obligation of an oath, but declines to testify, because if he does so it would incriminate him. Under the opinion as written, his declarations and confession would be admissible. In such case, he is not as one dead. The defendant is prevented from obtaining the benefit of his evidence, not because of his insanity, but because he claims his privilege. Wherein is this different from a living and sane witness refusing to answer for the same reason? In either case, the reason his evidence may not be obtained is the fact that he claims his privilege, so that the mere fact of insanity could not render the evidence of declarations competent. It may be that the opinion is not susceptible of such a construction, but I think it is. If the holding of the opinion

was squarely that permanent and confirmed insanity to such a degree renders the witness incompetent to comprehend the nature of an oath, and for that reason and because of his insanity, he could be placed upon the same basis as one dead, then there would be some reason for opening the door for the admission of such hearsay testimony. But I do not understand the opinion to go that far. If it does, then, in my opinion, the evidence does not show that Von Kutzlaben was in such a condition, or that he was afflicted with that degree of insanity. To my mind, the insanity shown here is no more than the usual insanity interposed as a defense in criminal cases. In fact, the defendant was claiming to be insane at the time of the derailment of the train with which he was charged. The defendant sought to take his testimony after that date, and the so-called confession was made after that date. Even after he was adjudged insane, he was discharged or released, and there is no sufficient showing that he was not mentally competent to testify.

There are other reasons than those that I have given. I am not disposed to take the time and attempt to fully cover the subject, because the case has been pending for a long time. It is desirable that the case be not longer delayed. In my opinion, the evidence is hearsay, and therefore incompetent. I would not be disposed to open the door any wider for the admission of hearsay testimony. If it is done now, the next step will be to still widen the door to admit declarations of a person whose evidence may not be obtainable because of illness or absence.

I dissent also from that part of the holding in the majority opinion that it is competent for witnesses to testify that marks were made by a crowbar. It is a matter, I think, that the jury could know as much about as the witnesses. It would be proper for the witnesses to describe the marks. If qualified as experts, they could doubtless give their opinion that such marks could have been made by a crowbar, but I think they should not be permitted to say that they were so made. *State*

v. Rainsbarger, 74 Iowa, at 204; *Sever v. Minneapolis & St. L. R. Co.*, 156 Iowa 664 and cases; 5 Encyc. of Evidence, 662; Lawson, Expert and Opinion Evidence, 557 *et seq.* and 571; *Cook v. Johnston*, 58 Mich. 437; *Riley v. State*, 88 Ala. 193; *Fireman's Insurance Co. v. Mohlman*, 91 Fed. 85.

Furthermore, witness had already testified without objection that the marks were so made and where they were. I think that there was no prejudice in sustaining objections to like questions on the same subject.

I would affirm.

DEEMER, J. (Dissenting). I. I am not convinced of the soundness of that branch of the opinion dealing with the admissibility of the admissions, declarations or confessions made by Von Kutzlaben, and, although the time is short for a full investigation and discussion of the subject, I am convinced that the majority, while stating the rules adopted by the great majority of the courts, have followed a very small minority and enunciated a doctrine which, carried to its logical conclusions, will admit all declarations made by a stranger against his interest, even though it be in the form of a confession, whenever, for any reason, it is either impossible or inconvenient to take his testimony, although he be alive; thus giving effect to hearsay testimony, which, of course, is not under oath, and without any opportunity to cross-examine the declarant.

Let me say first that the discussion of the majority is broader than the question presented. The sole question here is, Is testimony as to the statements made by Von Kutzlaben, a stranger to this case, admissible purely upon the ground that they were declarations against interest? Authorities regarding the admission of testimony once taken under oath, with full privilege of cross-examination, where the person giving the testimony is not available as a witness by reason of death, absence from the jurisdiction of the trial court, etc., are not in point; for in such cases, the only proposition involved is

whether or not such testimony, already taken under the sanction of an oath, and with full cross-examination, may, in a subsequent trial, be treated as a deposition; and in such cases it matters not whether the witness' testimony be for or against his interest. The sole question here is, other things being conceded, Is his testimony material and relevant to the issues, and competent to prove them? The introduction into the opinion of authorities upon this proposition gives us no help, and is liable to lead us astray in deciding the real question involved, to wit, What is essential to the admission of testimony as declarations against interest, such testimony being without the sanction of an oath, and without the usual right of cross-examination?

Testimony as to statements and declarations made by a stranger to a suit is clearly hearsay, and must be excluded unless it falls within some exception to the rule; and to come within the exception, the conditions for admission must be strictly complied with. As said by Judge Dillon, in *Mahaska County v. Ingalls*, 16 Iowa 81, the case so frequently referred to by the majority:

"It is the just observation of one of the most learned as well as experienced of American jurists, that 'The rules of evidence are of great importance, and cannot be departed from without endangering private as well as public rights. Courts are therefore extremely cautious in the introduction of any new doctrines of evidence which trench upon old and established principles.' Per Story, J., in *Nicholls v. Webb*, 8 Wheat. 332.

"This species of evidence being somewhat anomalous in its character, and standing on the *ultima thule* of competent testimony, is not highly favored by the courts, and the tendency is rather to restrict than to enlarge the right to receive it, or at least to require the evidence to be brought *clearly* within *all* the conditions requisite for its reception."

As announced by the English courts, where the rule originated, it was essential: (1) That the declarant be dead—and

to this there have never been any exceptions by the courts of the mother country; (2) that the declaration be against the pecuniary or proprietary interest of the declarant—and, as a rule, confessions of crime or declarations which might create a civil or criminal liability were not admitted. These propositions are conceded by the majority, but, notwithstanding, some other exceptions adopted by a very few courts are treated as the equivalent of death, and these exceptions, if once introduced into the body of our law, must be carried to their logical conclusion, and in the future held to cover all cases where, for any reason, the testimony of the declarant cannot be had for the trial.

Must the declarant be dead? The rule is, Yes. Shall we introduce something else? This question was first answered by Lord Ellenborough, in *Harrison v. Blades*, 3 Camp. 457, 458, in this way:

“No case has gone so far and I am afraid to establish a precedent. It is difficult to determine when a patient is past all hopes of cure. If such a relaxation of the rules of evidence were permitted, there would be sudden indispositions and recoveries.”

Where the question has come before the courts of this country, the same result was reached. *Currier v. Gale*, 14 Gray (Mass.) 504; *Rand v. Dodge*, 17 N. H. 343; *Jones v. Henry*, 84 N. C. 320; *Churchill v. Smith*, 16 Vt. 560; *Miller v. Wood*, 44 Vt. 378; *Lowry v. Moss*, 1 Strob. (S. C.) 63; *Buchanan v. Moore*, 10 S. & R. (Pa.) 275; *Carpenter v. Hatch* (N. H.), 15 Atl. 219; *Baker v. Taylor* (Minn.), 55 N. W. 823; *Fitch v. Chapman*, 10 Conn. 8; *Humes v. O'Bryan*, 74 Ala. 64. In some of the cases, the declarant was insane; in others he was beyond the jurisdiction of the courts; in others, too ill to attend trial; and in one, stricken with apoplexy so that he could not speak. In but one case to which my attention has been called has a different rule been held, and that is *Griffith v. Sauls* (Tex.), 14 S. W. 230. That case was decided without any apparent investigation of the authorities, for none are

cited or relied upon in support of the opinion. In our own case of *Mahaska County v. Ingalls*, *supra*, Judge Dillon says that absence from the jurisdiction of the court will not answer, citing *Brewster v. Doane*, 2 Hill (N. Y.) 537; *Moore v. Andrews*, 5 Port. (Ala.) 107. True, he adds:

"We need only say that probably the courts would not be inclined to relax the rule so as to dispense with this condition (death) unless it might be in the case of confirmed insanity."

Surely this is not a decision that insanity is the equivalent of death, and even this guarded expression says "confirmed insanity."

As said by my brother Preston, in his dissent, even if we were to recognize insanity as the equivalent of death, it must be confirmed insanity, and here there is no proof that Von Kutzlaben is a confirmed lunatic in the sense that he was unable to understand the nature and character of an oath. He has been released by a court, and by a proper board of insanity, is now at large, and there is no showing as to the nature of his mental disease when declared insane. As I understand it, in the celebrated *Thaw* case, it was contended that, as Thaw was the inmate of an insane asylum in the state of New York, this was a conclusive determination that he was so insane that he could not be guilty of a conspiracy to procure his escape. Although I have not seen the opinion of the Supreme Court of the United States, I understand that this position was declared untenable, and Thaw was sent to New York for a trial, where the question of his insanity as applied to the charge might be investigated.

In this state, every human being of sufficient capacity to understand the nature of an oath is a competent witness. When was it determined that Von Kutzlaben did not have capacity to understand the nature of an oath? That question could only be determined by the trial court before whom it was proposed to introduce his testimony, and it has never been determined, nor could it be until he was called to give evidence in some case; for it is his capacity at that time and as to a

particular matter that is to be inquired into. This has never been done, and it seems to me that, conceding his insanity as to certain things, there is nothing here to show that the degree of his insanity is the same as if he were dead—that is to say, that he was unable to take an oath, and therefore as dead as if he were in his grave.

It should be stated that, since writing the foregoing, I have discovered another case which seems to hold with the majority, but that case is also authority for the proposition that inability to produce the declarant's testimony from any cause, as absence from jurisdiction, physical or mental incapacity, assurance that the witness would claim his privilege, or immunity from giving testimony, is the equivalent of death. Logically this is true, but none of the members of this court are prepared to go to this extent. The line must be drawn somewhere, and I think that it is safer to announce the one generally adhered to, that the declarant must be physically dead. Once say that something else is the equivalent, there is no stopping.

In *Hutchinson v. Watkins*, 17 Iowa 475, this court excluded testimony as to declarations because the declarant was alive, within the reach of a subpoena, and competent to testify.

II. Again, the declaration must be against the pecuniary or proprietary interest of the declarant. That the confession or declaration here involved was not against the declarant's proprietary interest is, of course, true, and the question remains, Was it against his pecuniary interest? It is everywhere held, as I understand it, that confessions of a crime made by one, which, of course, are against his interest, are not admissible. When this matter was first broached in England, Lord Brougham said:

"To say, if a man should confess a felony for which he would be liable to prosecution, that therefore, the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another

person, is one of the most monstrous and untenable propositions that can be advanced." *Sussex Peerage case*, 11 Clark & F. 85; *Smith v. Blakey*, L. R. 2 Q. B. (1866-1867) 326.

See, also, *Davis v. Lloyd*, 1 Car. & K. 275, 276.

The following American cases are also to the same effect: *People v. Hall* (Cal.), 30 Pac. 7; *Commonwealth v. Chance*, 174 Mass. 245; *Benton v. Starr* (Conn.), 20 Atl. 450; *Farrell v. Weitz*, 160 Mass. 288; *Ayer v. Colgrove*, 81 Hun. 322; *Penner v. Cooper*, 4 Munf. (Va.) 458.

There is some conflict in the decisions on this point, and one case seems to hold that, if the admission made by the declarant might have been sufficient to justify a recovery against him in a civil suit, this is sufficient to satisfy the requirement that it was against interest. See *Halvorsen v. Lumber Co.*, referred to by the majority. I am not prepared to say that this is the only case so holding, and I concede that there is a conflict upon the proposition; but, notwithstanding, we held at an early day that declarations which, if true, might be used as evidence against one in a civil case for tort, are not declarations against pecuniary interest. That case is *Ibbitson v. Brown*, 5 Iowa 532, which has never been doubted or challenged since its announcement.

Quite in point on this proposition, I think, is the rule that a defendant charged with crime cannot introduce in his defense the confession made by another, then deceased, that he had committed the offense with which defendant was charged, which confession or admission would or might have made him liable in tort as well as criminally responsible. This is held by practically all the cases: *Davis v. Commonwealth*, 95 Ky. 19 (23 S. W. 585); *State v. West* (La.), 12 So. 7; *Commonwealth v. Chabbock*, 1 Mass. 143; *Helm v. State* (Miss.), 7 So. 487.

Again, we have held that a defendant charged with murder could not introduce in his defense a statement of the deceased that he (defendant) was in no way to blame. *State v. Sale*, 119 Iowa 1.

Whilst I do not regard this proposition as decisive of the question here being argued, I cite it as opposed to the doctrine of *State v. Alcorn*, 7 Ida. 599 (64 Pac. 1014), relied upon by the majority. Other cases support *State v. Sale*, *supra*. They are cited in 4 Chamberlayne on Evidence, Sec. 2779. The list includes cases from nearly every state, and shows the trend of the authorities.

Georgia R. Co. v. Fitzgerald, 108 Ga. 507, cited by the majority, announces a doctrine which I do not think the majority approve. It is this:

“ ‘Self-disserving’ declarations made by a deceased person having peculiar opportunities to know the truth as to the matter under investigation may be proved even in cases between third parties, none of whom claim under or through him.”

If there be any such rule of evidence, I confess that I have not been able to find it announced in any other decision. Self-serving declarations are never admissible, as I understand it, unless part of the *res gestae*, no matter whether made by a third person or a party to a suit.

In *Walker v. Brantner*, 59 Kas. 117 (52 Pac. 80), the declarations admitted were of the deceased husband of the plaintiff in a suit brought by the wife for damages due to the death of the husband. It is difficult to see on what theory these were admitted, as against his (declarant's) pecuniary or proprietary interest. They were doubtless admissible, if at all, as part of the *res gestae*, or as of one in privity with the plaintiff. I see no reason for departing from the rule announced in *State v. Sale*. It has the great weight of authority in its support.

In *Mahaska County v. Ingalls*, *supra*, the effect of the admission was that declarant had in his possession certain money which he had taken from the county, from which a promise would be implied on his part to return the same, and from which the inference would arise that in the amount of the money thus taken, he had a pecuniary or proprietary interest.

In *Moehn v. Moehn*, 105 Iowa 710, cited by the majority, the declarations of a deceased payee and indorser of a note that the note had not been paid were held inadmissible as a declaration against interest, in the absence of proof that the maker was insolvent.

In *Ellis v. Newell*, 120 Iowa 71, also relied upon by the majority, the declarations of a deceased donor, made subsequently to a gift and not a part of the *res gestae*, to the effect that the conveyance was intended as a gift, and not as an advancement, were held inadmissible, as not being against his pecuniary interest, following *Westcott v. Westcott*, 75 Iowa 628.

In this connection, a distinction must be made between ordinary declarations, and entries or other writings of deceased persons in the course of business. This latter is covered by statute. Code Sec. 4622.

A very pretty question will arise upon a retrial of this case, if one be had, if it be shown on that trial that Von Kutzlaben was insane when he made the declarations. If the majority is correct, his declarations cannot be received in evidence at all, because of his being a lunatic. Whereas, according to at least one case, declarations made by an infant, who was not permitted to testify on the trial of a case because he did not understand the nature of an oath, were permitted to be shown as admissions against interest. See *Atchison, T. & S. F. R. Co. v. Potter* (Kans.), 72 Am. St. 385.

I admit that there is considerable confusion in the cases upon the proposition now being considered, due to the failure of courts to observe the distinction between admissions and confessions, declarations explanatory of possession, dying declarations, declarations or statements which were a part of the *res gestae*, and declarations in form of testimony given in a prior proceeding, the witness having died after his testimony was taken; and entries made by a deceased person in the course of his business, as books of account, or as a public official.

The question before us is clear and distinct. Was the

testimony as to what Von Kutzlaben said admissible as a declaration against interest? After as careful an investigation as I have been able to make in a limited time, I think that the testimony was inadmissible.

In view of the concurring opinion written by brother Salinger, since this dissent was prepared, it seems appropriate to make some further observations in an attempt to clarify the law.

In the first place, the argument for the establishment of a new rule of evidence, based upon the decision in the *Mentzer* case, which applied old principles to new situations due to changes in the industrial and commercial world—changes not foreseen or to be reasonably apprehended when another basic rule was established—is rather a forced analogy. Damages for mental anguish had always been allowed before the Morse invention, and when a telegraph company failed in its duty, either arising out of contract or one imposed by law, the question of the measure of damages of necessity became a new question, upon which either the rule to award damages for mental anguish or to deny them might be established. It was the opinion of this court that, following old and established principles, damages for mental anguish might be allowed. Other courts were of contrary opinion, and no recent count of cases has been made on this proposition. One thing may safely be assumed from the establishment of the rule for this state: that telegraph companies have been more diligent in doing their duty with reference to death messages; and it may also be noticed that the apprehended flood of litigation from the establishment of the rule has not occurred. In the instant case, for more than a century there never has been any doubt about the rule as to declarations against interest, until not more than two courts in this country, apparently without consideration of authorities, announced another rule with reference thereto. One of these cases is so thoroughly discredited in both the majority and concurring opinions that it is no longer a staff upon which to lean; and the other, as an examination will

show, is so poorly considered that it, too, affords feeble support.

It is to be noted that no new conditions have arisen, calling for a different rule of evidence. From the time of its original pronouncement, witnesses were bound to die, were likely to become insane, or to be stricken with apoplexy, or to go beyond the seas, or to be ill. None of these things are of modern invention, and the reasons for their inclusion, as exceptions to the hearsay rule, were quite as potent as in this day and age of the world.

The substantive law must, if it is to meet the needs of a changing civilization, of the progress of events of the industrial evolution and revolution, continue to grow and to expand. The adjective and remedial law, being in their essence either analysis or logic, must also grow; but in this growth it can never get away from established principles, except by legislative enactment.

The fundamental rules of evidence should be stable; for, after all is said, they are the only safeguards to the ascertainment of truth in a judicial investigation. So that every circumstance which the majority now considers as having a bearing upon what the rules and exceptions to the hearsay rule should be were just as clear to the judges who established them as they are to us. At this point, it is well to recall Judge Dillon's reference to the dangers to be apprehended in departing from well-settled rules of evidence.

It is not clear whether the author of the concurring opinion is announcing the rule that everyone committed to a state hospital for the insane is presumed to be there for confirmed insanity, is totally insane, and incompetent to be sworn as a witness,—which presumption cannot be rebutted by showing that, notwithstanding the adjudication, he does in fact understand the nature and obligation of an oath,—or whether it is a rebuttable presumption which is subject to proof as to the fact of his competency. Again, it is difficult to understand whether the majority of the court means to hold that

one adjudged insane is conclusively presumed to be incompetent to give testimony. The majority uses the words "total insanity" and "confirmed insanity" as the same thing. I do not think they are the same, although the majority is doubtless logical in saying that insanity established is confirmed, and, being confirmed, is total. Total insanity means, to my mind, utter, absolute insanity; the equivalent of imbecility or idiocy. It seems to me that it must be this to be the equivalent of death. What is there in this record to show any such degree of insanity? Nothing but a record that Von Kutzlaben was insane and ordered committed until he became sane. Nothing more was determined than that he was a fit subject for confinement in the hospital until he became sane. He was then released on habeas corpus and sent to the Jones County board of insane commissioners for hearing, and, upon that hearing, it was found that it was safe for him to be discharged; but he was ordered taken and delivered to the custody of his mother; and the record shows that this confirmed lunatic, this man who is the same as dead, is now at large, residing either in Chicago, or at some place in New Jersey. I do not think that there is any finding anywhere that he is, or at any time was, the same as dead, mentally incompetent to give testimony, or that he was ever adjudged to be totally insane.

To cap the climax at this point, it appears that the defendant, through its counsel, sued out papers to take the testimony of this witness, went to Anamosa, had him sworn as a witness, and would undoubtedly have taken his full deposition, but was thwarted in its efforts to do so, because this witness, on advice of counsel, claimed his privilege, on the ground that answers might tend to incriminate him. This attempt to take the deposition was in July, 1907, and the confession was made in March of the year 1905. It seems, then, that the real reason for claiming that his confession is admissible is because he voluntarily, when sane, closed his mouth

on advice of counsel, which he had the right to do, and no power on earth could compel him to open it.

Although the majority says that he was then sane, he was dead so far as that no power could make him speak. Is this the equivalent of death? To be logical, the majority must so affirm, and this is really what I understand the opinions to hold; for, no matter what his condition thereafter, sane or insane, it is not his insanity which prevented defendant from getting his testimony.

Where is the finding that, when the declaration was offered in evidence, the witness Von Kutzlaben, who had then been discharged both by a court on habeas corpus and by the board of insane commissioners, was then at liberty and not in the custody of anyone, was then totally insane, to the same extent as if he were dead, and could not speak? Does the majority hold that, because a witness claims his privilege from testifying, his declarations against interest may be received as if he were dead? There is more reason for so saying than to affirm that, as he is insane, and although he may speak and testify, his declaration against interest may be received. Especially where defendant undertook to get his deposition, thus affirming his sanity, but was prevented because the witness claimed his privilege.

Again, it seems to me that the majority is bound to say that one found to be insane, no matter what the degree of his insanity in fact, is conclusively presumed to be incompetent, and therefore cannot be permitted to even take an oath, or that the presumption is rebuttable, and if rebuttable, it then becomes a question of fact as to whether or not he was in fact of sufficient capacity to understand the nature and obligation of an oath, with nothing more, at best, than a mere rebuttable presumption of incompetency. If the majority insists upon the former rule, then I most emphatically dissent. If the latter, then it must be conceded that the question of the admissibility of the evidence was primarily for the court, and there was testimony to sustain the ruling. If the ruling was

correct, it matters not on what ground it was placed, and the objection to the testimony was sufficient to justify the trial court in sustaining it on the ground suggested. As already noted, at one time the defendant itself conceded that the witness was competent to testify. It had him sworn, and proceeded as far as it could in taking his testimony, and is now complaining in this very case because plaintiff's counsel suggested to the witness that he should not answer some of the questions propounded. It thus appears that the witness is not only at large, having the same liberty as normal persons, but, in addition, there is a judicial and semi-judicial finding that he should be discharged from custody, and that it was safe for him to be at large, and the further fact that at one time defendant itself had him sworn as a witness, and is now complaining because he was not permitted to testify. It was not insanity which closed his mouth.

In the face of this record, what becomes of the presumption that he was an incompetent witness, totally insane, and dead to the world?

On other matters, I concur with Justice Preston, and would affirm.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY Co., Appellant, v.
WRIGHT COUNTY DRAINAGE DISTRICT et al., Appellees.

DRAINS: Assessment of Benefits—Appeal—Presumption. An assess-

- 1 ment of benefits for a drainage improvement, regularly made by the officers upon whom that duty is laid by statute, and approved by the lower court on appeal, is clothed with a presumption of correctness so strong that the burden of proof is on appellant in the Supreme Court to make some affirmative showing of substantial grounds of invalidity.

DRAINS: Assessment of Benefits—Appeal—Question at Issue. The

- 2,6 limit of the right of the landowner, on appeal from an assessment of benefits for a drainage improvement, is to show that the

assessment is not an "equitable apportionment." He may not show that his lands *have not been benefited at all*. The question whether his lands would receive *some* benefit was fully adjudicated at a former stage of the proceeding, to wit, when the district was established and the lands were included therein. (Sec. 1989-a 12, Code Supp., 1913.) It necessarily follows that the court cannot *wholly set aside* such assessment. It may *reduce*, but only on a clear showing of inequitableness.

DRAINS: Assessment of Benefits—Railway Right of Way—Equity, 3, 5 ableness of Assessment—Acreage Basis—Market Value. An assessment of benefits on a railway right of way for a drainage improvement will not be condemned as inequitable because, *on an acreage basis*, it is materially greater than on farm lands in the district. The very nature of the right of way forbids such comparison. Neither will such assessment be condemned because it can be shown that no immediate increase in market value of the right of way took place.

DRAINS: Assessment of Benefits—Assessment Exceeding Benefits.

4 An assessment of benefits for a drainage improvement is not necessarily invalid because in excess of benefits.

DRAINS: Assessment of Benefits—Railway Right of Way—Equity, 3, 5 bleness of Assessment—Acreage Basis—Market Value.

DRAINS: Assessment of Benefits—Appeal—Question at Issue.
2, 6

Appeal from Wright District Court.—C. E. ALBROOK, Judge.

WEDNESDAY, NOVEMBER 24, 1915.

REHEARING DENIED FRIDAY, APRIL 7, 1916.

THE plaintiff's right of way having been assessed for its alleged proportion of the cost of ditches constructed in the drainage district named in the caption, it appealed therefrom to the district court where the assessment was confirmed, and plaintiff now prosecutes a further appeal to this court.

F. W. Sargeant, Robert J. Bannister, J. H. Johnson and Ladd & Rogers, for appellant.

Peterson, McGrath & Archerd, for appellees.

WEAVER, J.—Drainage District No. 43 includes an area of about 1,008 acres, and the total cost of the improvement is about \$10,000. The plaintiff's right of way, 100 feet wide, extends into and across the district for a distance of about 1 2/10 miles, and is crossed in three places by the main ditch or laterals. The assessment laid upon the right of way is \$682.97. There is no objection to the regularity of the organization of the district or to the proceedings leading up to the final assessment of benefits. The one proposition, though stated in various ways, is that the assessment is inequitable and not according to benefits, and that plaintiff's right of way received no benefit whatever from the improvement. Aside from exhibiting a map of the district and of the several tracts or parcels of land therein, together with the assessment list, the testimony on part of plaintiff is confined to the single proposition just mentioned—that its property within the district has received no benefit and should therefore be charged with no part of the expense.

The assessment, having been regularly made by the officers upon whom that duty is laid by the statute, and having been affirmed on appeal by the court, comes to us with every presumption in its favor, and the burden is upon the appellant to make some affirmative showing of substantial grounds for its complaint. It is not enough for it to say or to

1. DRAINS: assessment of benefits: appeal: presumption.

produce witnesses who may swear that it has received no benefit whatever. No amount of that kind of evidence can avail to overthrow the assessment. The statute expressly provides that, upon appeal from an assessment

2. DRAINS: assessment of benefits: appeal: question at issue.

of this nature, it shall not be competent for the appellant to show that its property has not been benefited by the improvement. Code Section 1947; Sec. 1989-a12, Code Supp., 1913. The fact that it is benefited is conclusively settled by the action of the board of supervisors in including it within the territory of the drainage district after due notice and opportunity to be heard is

given the owner. That question cannot be reopened upon an appeal from the assessment of benefits. *Zinser v. Board of Supervisors*, 137 Iowa 660; *Allerton v. Monona County*, 111 Iowa 560; *Ross v. Board of Supervisors*, 128 Iowa 427, 439; *Kelley v. Drainage District*, 158 Iowa 735, 746.

If, therefore, we reject as incompetent the evidence adduced by the plaintiff that its property was not benefited by the improvement, there is little, if anything, left in the

record on which to base a finding that the

3. DRAINS: assessment of benefits: right of way: equitableness of assessment: acreage basis: market value.

assessment is excessive or is materially out of proportion to the benefits. True, if figured out on a mere acreage basis, the amount assessed is materially greater than the average assessment laid upon the farm lands in the

district; but that in itself is quite manifestly an insufficient ground for setting aside or reducing the assessment, for the statute does not contemplate the treatment of the right of way solely as a mere fraction of the agricultural area in which it is found. Upon it is placed the plaintiff's road, over which commerce is carried on. Upon it are the graded roadbed, the ties, rails, bridges, culverts, fences and whatever more is found convenient in caring for and promoting the business to which it is devoted. That it was competent for the board of supervisors, notwithstanding the denial by plaintiff's witnesses, to take all these matters into consideration and to find that the solidity and safety of the roadbed, the effective life of the ties, the maintenance of the track, culverts, bridges and fences, would be materially promoted by drainage of the swamp and surface waters from its right of way and from the immediately adjacent premises, cannot be doubted. Then, too, the right to assess is not dependent upon a showing of benefits in the shape of an immediate increase in market values, but actual values, intrinsic value or worth. *Camp v. City of Davenport*, 151 Iowa 33, 38, and cases there cited.

Nor is an assessment necessarily invalid because the evidence shows that the assessment exceeds the benefits. *Jack-*

son v. Board of Supervisors, 159 Iowa 673, 676; *Collins v. Board of Supervisors*, 158 Iowa 322. The

4. DRAINS: assessment of benefits: assessment exceeding benefits.

thing which the board is to effectuate in an assessment is an "equitable apportionment" of the costs and expenses of the project (see Sec. 1989-a12, Code Supp., 1913); and while

the fact, if it be shown, that the assessment is greater than the benefit, is doubtless a legitimate item of evidence to be considered with all other competent testimony in determining whether the apportionment is inequitable, it is in itself no ground for relief on appeal from the action of the board.

Plaintiff's case, as made by the testimony, is substantially this: (1) That its right of way is in no manner benefited by the drainage; and (2) that the assessment shows that, on an

5. DRAINS: assessment of benefits: railway right of way: equitableness of assessment: acreage basis: market value.

acreage basis, the right of way is assessed at a considerably higher rate than the agricultural lands of the district. Evidence of the first, as we have seen, is declared incompetent by statute, and the second, for reasons already stated, is of itself of a very inconclu-

sive character and wholly insufficient to overcome the presumption of corrections which attaches to an assessment regularly made. Many other considerations concerning which there is no evidence in this record may properly have influenced the judgment of the board. *Jackson v. Board of Supervisors*, 159 Iowa 676; *Chicago, R. I. & P. R. Co. v. City of Centerville*, 172 Iowa 444; *Chicago & N. W. R. Co. v. Board of Supervisors of Hamilton County*, 171 Iowa 741; *Northern Pac. R. Co. v. City of Seattle* (Wash.), 91 Pac. 244.

Under the presumption of benefits derived from a local improvement constructed by statutory authority after due notice to the property owner, and under the inhibition of evidence to the effect that no benefits have in fact been received, neither the district court nor this court is authorized to set aside the levy, and the utmost relief which it can grant

6. DRAINS: assessment of benefits: appeal: question at issue.

in any case is to modify or reduce a given assessment. Nor can this measure of relief be given except upon clear and satisfactory showing that, after considering the various elements which may properly enter into the estimate, the court is satisfied that the assessment has been inequitably apportioned. If such showing is not made, the assessment must stand. In *Camp v. City of Davenport*, 151 Iowa 36, it was held that evidence upon part of the property owner that his property was in no manner benefited, while, on the other hand, witnesses expressed the opinion that the property was benefited, without stating the amount, was insufficient to justify the court in interfering with the assessment, and an order of the trial court making a reduction was reversed. The cited case is the more in point, in that it involved the application of a statute which does not forbid proof of the lack of all benefits. The plaintiff, having the burden of negating the existence of any fact or condition which could have justified the board in making the assessment complained of, has distinctly failed to make such showing, and the record presents no valid ground on which the relief asked can be granted. Our holding in the recent case, *Chicago & N. W. R. Co. v. Hamilton County*, *supra*, is in no way inconsistent with our pronouncement in the case at bar. There, a reduction of the assessment had been made by the trial court, and the judgment came up to us with the usual presumptions in its favor. Upon such presumption, supported by a showing of evidence differing quite materially in some respects from that now before us, we refused to interfere with and affirmed the finding below. It is true that cases of this class are tried as in equity and are heard *de novo*, but this does not exclude the idea that we should pay due respect to the finding of the board of supervisors, which is the statutory tribunal of original jurisdiction. As we have frequently said, the members of the board are upon the ground, and they properly act upon and determine these assessments to a large degree from personal inspection and personal knowledge of the situation of each

piece of property affected by their action, and assuming, as we must, that they are men of presumably fair degree of intelligence, actuated by an honest purpose to make an equitable distribution of the burden, it is always extremely probable that their conclusions are more nearly correct than an estimate made by the court, which has before it only the meager showing appearing in a printed abstract. And when such assessment passes the test of the trial court sitting in the locality of the improvement and in the very atmosphere of the controversy and with the witnesses before it, it ought to and does require a clear and strong case for the appellant. to necessitate a finding that such assessment is erroneous. *Temple v. Hamilton County*, 134 Iowa 706.

Such a case not having been here made, the judgment of the trial court will be—*Affirmed*.

EVANS, C. J., DEEMER and PRESTON, JJ., concur.

IRA CONGER, Appellee, v. ORVILLE LEE, Appellant.

CONTRACTS: Rescission—Evidence. Evidence reviewed, and held
1 not to amount (a) to a rescission of a contract by plaintiff, or (b) to a repudiation by defendant.

CONTRACTS: Conditions—Evidence. Evidence reviewed, and held
2 sufficient to sustain a finding by the jury that a sale of corporate stock was not on the condition that certain other stock belonging to other parties should be retired.

FRAUDS, STATUTE OF: Sale of Personal Property—Performance—
3 **Effect.** A contract for the sale of corporate stock fully performed by the vendor is not within the statute of frauds.

Appeal from Sac District Court.—E. G. ALBERT, Judge.

FRIDAY, APRIL 7, 1916.

ACTION upon an oral contract alleged to have been fully performed by the plaintiff, whereby the defendant agreed to pay the plaintiff the sum of \$4,348.23. The defense was a

general denial. There was a trial to a jury and a verdict for the plaintiff for the amount sued for, and a judgment entered thereon. The defendant has appealed.—*Affirmed.*

Elwood & Tourgee and *Faville & Whitney*, for appellant.

E. L. McCord and *W. A. Helsell*, for appellee.

EVANS, C. J.—The chief controversy in the case is over a question of fact. At the close of the evidence, the defendant moved for a directed verdict, on the general ground that the plaintiff had failed to prove the alleged contract and had failed to prove performance of any alleged contract on his own part. This question is extensively discussed in the briefs, and involves the consideration of a considerable record. The parties were residents of Sac City. The subject matter of the contract had to do with the interest of the plaintiff in the Conger-Ball Company, a corporation doing business at Sac City. This company was originally capitalized at \$34,000, divided into stock shares of \$100 each. The plaintiff owned 231 shares thereof; W. A. Ball, 59 shares; and Laverne Lee, a son of the defendant, 50 shares. This company engaged in two separate lines or departments of business. The one is known in the record as the "elevator business," and the other as the "seed business." Prior to the transaction here involved, they had sold out the elevator business, but still retained the seed business. They had not changed the form of their capitalization.

The claim of the plaintiff is that he undertook to sell to defendant his interest in the seed business, which was still being carried on by the company. The active management of this business was conducted by Ball and Laverne Lee, the plaintiff having recently removed to California. The evidence for the plaintiff tended to show that the parties agreed upon a basis of valuation of plaintiff's so-called interest in the seed business, by ascertaining the value of the assets pertaining to such department. A total valuation of such assets was

agreed upon at \$8,000. The par value of plaintiff's interest, therefore, was taken to be $231/340$ of \$8,000, or about \$5,433. The defendant agreed to pay the plaintiff 80% of such estimated par value, and this is the amount sued for. There were some apparent complications involved in the negotiations; that is to say, the evidence as to some details is somewhat confusing to a stranger to the record. Conger was indebted to the corporation for something upwards of \$20,000, subject, however, to certain prospective offsets or credits. The price to be paid by the defendant was to be so paid to Ball, and was to be applied by Ball upon the plaintiff's indebtedness. The plaintiff was to execute to the corporation his promissory note for the balance due from him as soon as such balance was ascertained. The negotiations between plaintiff and defendant were carried on in the presence of and in consultation with both Ball and Laverne Lee. The defendant's final offer and his agreement upon the valuation of \$8,000 was communicated to the plaintiff through Ball, and was accepted by the plaintiff by communication to Ball. The delivery of plaintiff's stock was to be made to Ball. Ball was also to prepare and send to plaintiff in California a full statement of his account with the corporation, so that the amount of the note to be executed by plaintiff could be determined therefrom.

Among the assets of the corporation were about \$1,400 of accounts and notes, which were of more or less doubtful value. The plaintiff had agreed to assume the payment of these notes and accounts himself and to look to the debtors for reimbursement. The negotiations between the parties up to this point were had at Sac City, in October, 1913. Within a few days, the plaintiff departed for his home in California. Later, he received from Ball, by mail, a statement of his account, which carried an item of credit of \$4,348.26 as the value of "Seed Dept. stock @ 80¢." This statement showed a balance due to the corporation from plaintiff of something over \$4,900. The plaintiff sent to Ball by mail his promissory note for such amount, and sent to him all his stock

endorsed in blank. This was done in November, 1913. Just before this was done, some correspondence ensued between the parties which will be referred to later, and upon which each party relies as furnishing support to his own theory. We think that, at the time of the departure of the plaintiff, the evidence is abundant to justify a finding that the parties had reached an agreement along the lines herein indicated. The following excerpts from the evidence on behalf of plaintiff will be sufficient indication of the details of the testimony. Ball testified as follows:

"I am the Ball represented in Conger-Ball & Company. I was secretary and manager. Mr. Conger, Mr. Laverne Lee and myself are the persons who were interested in that company prior to October 1, 1913. I had a conversation with Mr. Orville Lee in regard to going over the books of the Conger-Ball & Company to ascertain the then value of its property. I had an appointment to meet Mr. Lee and Mr. Conger up at the office one evening and I think Mr. Conger asked me to come. We all met there. At that time the question of Mr. Lee's buying the interest of Mr. Conger in that institution was gone over more or less. Afterwards Mr. Lee and I figured up the then value of the Conger-Ball & Company property. I think we met there twice. Mr. Lee and I met there together at another time. I figured that the said business was worth \$8,000. Mr. Conger owned 231/340 of it. Mr. Lee told me to offer 80c on the dollar for the stock. I communicated this statement of Mr. Lee's to Mr. Conger. Mr. Conger thought it was pretty cheap but he says: 'I am going to be away and I am going to sell it.' I communicated Mr. Conger's answer to Mr. Lee. I can't tell you exactly what Mr. Lee said. I cannot give the exact wording but in substance he said that was satisfactory to him. When we all met there together it was suggested by Mr. Conger or Mr. Lee, I don't remember which, that the certificates when they were sent back, they were to be sent to me for transfer. Mr. Lee was present and that was agreed upon. I do not know who

suggested it. There was something said as to what ought to be done with certain old accounts and notes. There were certain accounts that were doubtful, that were to be charged up to Mr. Conger's account. They were charged up to Mr. Conger's account. Mr. Conger has paid that. I have seen Exhibit 'A' before. It is a statement of Mr. Conger's account as it appeared on the books of the company at that time. I sent the statement of account to Mr. Conger. Before sending it I submitted it to Mr. Lee. Mr. Lee said: 'I think that is the way we figured it.' I received from Mr. Conger his certificates evidencing his interest in this business. After I received them I called Mr. Lee's attention to the same. Mr. Lee looked at them. He did not say anything. Q. I mean this, Mr. Ball. Your evidence shows that the value of the concern was only \$8,000 and the original stock was worth \$34,000. Now in these conversations and in these deals with Mr. Lee, did you have any talk as to what was to be done with this stock, if anything, in order to make the stock the same as the actual value of the business? A. The stock was to be retired; all but the amount represented by the seed department. Previous to the time I received the stock, Mr. Lee came to the office and took out his check book and offered to pay for it. He offered to give his check for the amount. Well, he came in and said: 'Well, I guess I had better give you a check for that stock, hadn't I?' I said, 'You can if you wish,' and he got his check book out and pencil and was ready to write the check and he turned around and says: 'Has the stock come yet?' And I says: 'No, it hasn't.' And he said: 'Maybe I better wait until it comes.' After this transaction until Mr. Conger went to California, Mr. Lee come up to where the office was quite often. After I received the stock from Mr. Conger I talked with Mr. Lee once. We talked about the business whenever he came in just a general way. There was one particular transaction that I called to him for advice. This company was engaged in two branches of business. One we called the 'seed business' and one the 'grain

business.' The first talk I had with Mr. Lee about taking an interest in the business was at the seed house. It was, I should judge, about the first of October, 1913. Mr. Conger was present at the time. I think we met there twice. I am not sure. We met there two or three times. I wouldn't be sure which, twice anyhow. At the first meeting, Mr. Conger, Mr. Laverne Lee and Mr. Lee and myself were present. That was about the first of October. The next meeting was possibly the next night or the night after, I wouldn't be sure. The same parties were present. There was talk at these meetings about Mr. Lee buying Mr. Conger's stock. It was my understanding that Mr. Lee's proposed purchase of the stock was based on a proposition or idea that the stock was to be reduced to a total of only \$8,000. That was the talk. Not that Conger's stock alone was to be \$8,000 but that the total stock of the company was to be reduced from \$34,000 to \$8,000. Mr. Lee was not to pay eighty per cent. of the whole \$8,000. I had \$5,900 worth of stock and Laverne Lee had \$5,000 worth of stock and Mr. Conger had \$23,100 worth of stock. The talk was that after the total stock was reduced to \$8,000, Mr. Conger's interest would be $\frac{231}{340}$ of \$8,000, and that would be about \$5,433. It was talked of 80c on the dollar on a basis of \$5,400, Conger's share, and on the assumption and on the basis that the entire stock of the company was reduced so that our total outstanding capital would be only \$8,000. That was Mr. Lee's proposition that after all that was done he would consider an offer of 80c on the dollar or something like that, for Conger's stock. That was the general talk. Mr. Conger's stock was in there. My stock was there and Laverne Lee's stock was there in the safe. We never had a conference of all of us together after these two talks in the evening. Conger left for California possibly a week after. I wouldn't be sure just how soon. In the meantime there was no conference in which all were present. Mr. Conger went to California about that time. I sent him this statement that has been identified here. I accompanied it with a letter. I received a letter

from Mr. Conger along in the forepart of November. I had some correspondence with Mr. Conger as I testified on direct examination. I received a letter from him. After Mr. Conger had gone to California I had a talk with Mr. Lee. He was in a number of times. I testified that he was in and offered to pay for the stock. I don't know that I had a talk with Mr. Lee before that. I don't remember that I had a talk with him after that. I did show him a letter I received from Mr. Conger at one of those times. That was along the latter part of October. I showed him the letter. I have that letter with me. I had a talk with Mr. Lee after Mr. Conger went away. It was shortly after he had gone in October. I cannot remember any further conversation. I know that Mr. Lee was in a number of times and we talked about it a little. I don't know whether this matter came up,—I wouldn't say that it did; but we had conversations during that time, but what they were over I could not say. I don't know whether they were about this deal or not at that time, we had talks later. Between the time Conger went away and before I got the stock back I showed to Mr. Lee a letter which I have produced here now and which is identified by the reporter as Exhibit '3.' I cannot give you the date. I said in my direct examination that Mr. Lee took part in figuring up. At first there was Mr. Conger, Mr. Lee, and Mr. Laverne Lee and myself present. That was the first two meetings and then Mr. Lee and I met together. Those two meetings were the meetings at the seed house in which the four of us were present. I do not mean that Mr. Lee helped make up this statement which I identified on direct examination as being the one sent to Mr. Conger. I prepared it but I took the figures that he and I had both made. I prepared it finally after those two meetings. Conger was there when we made those figures. So that Conger and Lee and Laverne Lee and myself made those figures. There was a number of different figures and before we arrived at what we considered to be correct and right, and this was after Mr. Conger had gone that I took the figures and con-

densed them. These are the same identical figures, but we had a number of different figures there. We had been figuring it over three or four times from different angles. It was figured that way. It was figured in different ways, I don't know just how many. At least three different ways. And after that Mr. Conger went away and didn't do any more with the figuring. The time I testified about that Mr. Lee took out his check book, I am not sure who was present. I think the bookkeeper was present, Miss Roose. Nobody else that I remember of. I don't know whether Laverne Lee was there or not. I couldn't say how long that was after the two different meetings at which the four of us were present. It was just a few days before I received this letter from Mr. Conger. It was not before I sent this statement to Mr. Conger. It was after that. I don't know just when it was. It must have been just a day or two later. It was at the seed house office. Well, he came in, and he says: 'I guess I had better give you a check for stock, hadn't I?' and I said, 'You can if you wish,' and he had his check book out and his pencil and he says: 'Has the stock come?' and I says, 'It hasn't.' And he says: 'Maybe I better wait until it comes.' I showed this statement to Mr. Lee before I sent it to Mr. Conger. I don't remember of anyone being present at this talk. I think it happened in the office, I am not sure. It was shortly after the two talks of the evening associations of the four of us. Well, I don't know, as soon as Mr. Conger—as soon as this deal was settled I made up this statement. I don't know how long it was after the last talk of the four of us before I showed the statement to Mr. Lee. I cannot say positively that it was in the office or not. It must have been very shortly before we had the talk about the check book. * * * Mr. Conger didn't take part in the figuring as to the value of the seed business. Mr. Lee and myself did the figuring. We did some of the figuring while Mr. Conger was not present. That was after the two meetings about which I have testified.

It was at this meeting that Mr. Lee told me to submit the eighty per cent. proposition to Mr. Conger. The seed business of the Conger-Ball & Company was a side issue and kept separate. We kept a separate set of books. The other business of the Conger-Ball & Company had been practically disposed of. What we actually figured was the value of the seed business alone. That is, to get this \$8,000, I mean. We arrived at the conclusion that the fair value of the seed business was \$8,000. Mr. Conger owned of that seed business 231/340. Mr. Lee was to get Mr. Conger's interest in that business. Q. What was to become of the rest of the stock of Mr. Conger? A. That was to be retired."

While the defendant, as a witness, contended that the terms of the agreement were different from those testified to by the plaintiff and by Ball, his own testimony shows that he did understand that he had reached an agreement with the plaintiff. This is sufficiently indicated by the following excerpts from his testimony:

"I was buying Mr. Conger's stock which represented his interest in the seed business. I was not suggesting that I pay eighty cents on the dollar for all of Mr. Conger's stock.

"Mr. Ball told me that Mr. Conger had agreed with him if he could not get a better bid out of me than the 80 per cent. to sell it to me at that price. That was the basis we had talked about. I supposed he was satisfied and agreed to it before he left, because Mr. Ball told me that he was.

"Q. Whatever seems to have been the transaction, you did offer and agree to pay eighty cents on the dollar for Mr. Conger's interest? A. Yes, sir."

The defendant contends, however, that the subsequent correspondence between the parties, shortly after the plaintiff left for California, completely negatives the claim that the minds of the parties had ever met. We now turn to such correspondence. On October 21st, Ball mailed to the plaintiff the following letter:

"Sac City, Iowa, Oct. 21, 1913.

"Ira Conger, Fresno, Cal.

"Dear sir:—

"You will find enclosed figures on our deal here with a list of the accounts and notes charged to your account and note for balance. We thought this would be the best way to handle it as it is all cleaned up and off the books. I have had this made out for some time but was waiting to get Orville's approval and have just been able to get hold of him. Transfer the amount of your seed stock, \$5,435.33, to Orville and the balance to the Company. We are having some cold weather the past few days and think there will be no trouble in selling all the seed corn we have. Only wish we had more good corn.

"Yours truly,

"W. A. Ball."

Before receiving this letter, and on October 22nd, the plaintiff wrote to Ball the following letter:

"Fresno, Cal. 10-22-13.

"W. A. Ball, Sac City, Iowa.

"Dear Mr. Ball:—

"I arrived home in due season and have heard nothing from you in regard to the seed house settlement, and presume you have been busy getting it in shape. I think if it shows 8,600 or more on the books that it should be taken at book value where it is to be discounted 20%. Ask Mr. Lee if I am not correct. When you write, wish you would send me a copy of the 1913 invoice. Nothing new here that would interest an easterner. Have their corn all picked and nothing to do but to get ready to sow their grain which will be done next month. Hope you got in a nice bunch of corn.

"Yours truly,

"Ira Conger."

On November 7th, the defendant wrote to plaintiff the following letter:

"Nov. 7, 1913.

"Ira Conger: My dear sir and friend:—

"Mr. Ball has shown me your letter in which you seem not to be satisfied with the arrangement as it had been talked and in which I supposed you were agreed before you left here. This will not disappoint me in the least and now that you express dissatisfaction, I would much rather have nothing to do further in the matter. While the price may seem low, I still can see that while I invested \$5,000 less than two years ago, and have never had a cent of return, it has now been reported to be worth only about \$2,900 as shown by the July invoice. This isn't making money very rapidly and in my judgment it will take a lot of good intelligent hustling to make the business pay a dividend under the present condition. I am sure the boys will be glad to receive any suggestions from you as regards the future policy and operation of the business.

"Very resp't. &c,

"Orville Lee."

On November 12th, the plaintiff wrote to Ball and to the defendant the two following letters respectively:

"Fresno, Cal. Nov. 12, 1913.

"W. A. Ball, Sac City, Iowa.

"Dear sir:—

"I have yours of the 8th, also one from Mr. Lee. I don't see how Orville could have taken my letter as he did, as I considered the deal closed, but as we both had talked about wanting to be fair, I wanted to be sure he understood how that \$600 was and did not know as he understood that it was added to the property after the elevators were sold, and as I understood it, out of the earnings of the business.

"When we had our last meeting I felt sure I would see you and also Mr. Lee before leaving, and if I had I should have found out about some of these things at that time, but

as I could not see you again without staying over another day and did not think it was any use, for anything I could think of at that time.

"I have written Orville and think I have made myself plain, and do not want you or Mr. Lee to think I was dissatisfied and believe when you stop to think, that it was not strange that I should ask a few questions about the business figures as long as you folks did all the figuring.

"I am enclosing the note and stock. I have signed the stock in blank, so you can handle it as you may see fit.

"Yours truly,

"Ira Conger."

"Fresno, Cal. Nov. 12, 1913.

"Orville Lee, Sac City, Iowa.

"Dear Mr. Lee:—

"Yours of the 7th at hand, and sorry my letter gave you the idea I was dissatisfied, as I did not intend it that way, and if this deal could all been figured out while I was there, I would not have been obliged to have written any letters, which you know is hard to convey just what you want to.

"Now when I got the statement and note, as well as a long list of worthless accounts, I thought about the little conversation we had, when we both said we wanted to be fair, and so I wrote Mr. Ball to ask you about the \$600 that had been added to the property, as I understood it, since we had sold the elevators. And as errors and omissions are always allowable, did not want anything like that omitted, if you thought I should have it. Now that I know, I am sending the note, and stock to Mr. Ball, and do not believe that you think it so very strange that I should ask one question as long as you and Mr. Ball did all the figuring.

"I trust this little explanation will put you right as to my reason for writing to Mr. Ball as I did.

"Yours truly,

"Ira Conger."

No reply was ever made by defendant to plaintiff's letter of November 12th. For a year thereafter, the defendant gave substantial assistance in the management of the business at Sac City. The plaintiff assumed no further connection with the business after such letter, nor was he consulted concerning the same. During the ensuing year, a large business was transacted and large obligations were incurred for the corporation at the bank, amounting to about \$35,000. The notes of the corporation to the bank for such indebtedness were all guaranteed by Ball and the defendant and his son. No objection appears ever to have been made as to the method of actual performance of the contract by plaintiff. None of the papers were returned or objected to. The defendant knew that they had been sent to Ball in purported compliance with the contract. The plaintiff paid his note for the alleged balance due. He paid also the full amount of the notes and accounts assumed by him. Before bringing this suit, he paid also to the corporation the amount still due from him by reason of the failure of the defendant to pay the amount involved herein.

I. It is the contention of the defendant in argument that, by his letter of October 22nd, the plaintiff repudiated the previous agreement, if any, by his alleged counter-proposition. If this be correct, it is contended that such letter had the effect to open the door of rescission or repudiation to the defendant, and that the defendant availed himself of that privilege by his letter of November 7th. It is contended that, by such letter of November 7th, the defendant "threw up the deal." Passing the question whether the plaintiff's letter of October 22nd amounted to a counter-proposition, we do not think that the defendant's letter of November 7th had the effect to rescind or repudiate the deal. The particular part of the letter upon which defendant relies at this point is as follows:

1. CONTRACTS: rescission: evidence.

"This will not disappoint me in the least, and now that

you express dissatisfaction, I *would much rather* have nothing further to do in the matter."

This falls clearly short of *refusing* to have anything further to do in the matter. The most that can be said for it is that it opened the door of release to the plaintiff and expressed a preference to that end.

Indeed, under the issues made by the pleadings, it is doubtful whether these letters could be considered at all for the purpose of affirmative repudiation, even if their language were capable of such construction. The issues were made by general denial. The letters are competent and proper as bearing upon the question of whether these parties had previously agreed. This letter of the defendant recites his understanding that there was an agreement before the plaintiff left Sac City. Indeed, the *subsequent* conduct of the parties after this correspondence is not consistent with any other view than that they had agreed. The silence of the defendant after receiving the letter of November 12th, knowing that the plaintiff had sent on his stock to Ball for delivery and surrender in purported performance of his contract, was itself an acquiescence on his part in what had been done; at least it was a circumstance of great weight and was entitled to the consideration of the jury. We are clear, therefore, that the trial court did not err in refusing to direct a verdict for the defendant.

II. It is the further contention of the defendant that the contract sued on was subject to a condition precedent, to the effect that all the stock of the corporation in excess of the sum of \$8,000 was to be retired, and that the contract was not to go into effect until after such retiring of the excess stock. The question thus raised was submitted by the trial court to the jury. The defendant urges, however, that the evidence in support of his contention at this point was conclusive, and that it was decisive of the case as a matter of law. We do not deem the

2. CONTRACTS:
conditions:
evidence.

evidence by any means conclusive at this point. The defendant testified in support of the contention. The plaintiff and Ball as witnesses also conceded that there was something said at the time of the negotiations about retiring the excess stock. But they did not concede that Conger assumed to retire the stock in any other sense than in the surrender of his own. In considering this testimony, it is to be remembered that the negotiations between Conger and Lee, so far as they were personal, were had in the presence of the other two stockholders. The transaction contemplated future co-operation between Lee and his son and Ball in the future management of the company. Ball was the general manager of the corporation. Lee made him his agent, through whom he made his final offer to Conger and through whom he received the acceptance from Conger. The evidence justified a finding that the delivery of the stock by Conger was to be made to Ball. At the same time, Conger was to deliver his note to Ball for balance due the corporation. Ball was acting in the dual capacity of agent for the corporation and the agent for Lee. Such dual relation was entirely consistent. The claim that Conger was to retire all the excess stock as a condition precedent to a completed sale is quite inconsistent with other facts which are undisputed or well proven. Conger had no control over the stock of defendant's son or over the stock of Ball, and could not retire the same if he wished to. Indeed, being absent from the state, he could retire his own stock only in the sense that he could surrender the same to the proper officer of the corporation. He did surrender all his certificates endorsed in blank to Ball, who was not only the general manager of the corporation but was its secretary and treasurer, and also, as before said, the agent of Lee. His letter transmitting the same advised that he was endorsing the same in blank, "so you can handle it as you may see fit." The defendant, however, lays special stress upon an allegation in the original petition which the plaintiff in the course of the

trial withdrew by amendment, and which the defendant thereupon introduced in evidence. Such allegation was the following:

“The plaintiff further says that he sold and delivered that amount of his stock to the defendant for the agreed price of \$4,348.23, under a further agreement that the rest of his stock should be surrendered to the corporation to be cancelled and retired, (so that, after this arrangement, the outstanding stock, at par value, would only equal the real value of the assets of the corporation).”

It is urged that this allegation, having been made in a verified petition, is conclusive proof upon the plaintiff, and that the fact contended for is thereby established. It may be conceded that this allegation in the original verified petition is entitled to great weight as evidence, but it is well settled that it is not conclusive. But we think the allegation itself, if taken as true, does not in its terms sustain the contention of the defendant. Under this allegation, the plaintiff undertook that the rest of his stock “*should be surrendered to the corporation* to be cancelled and retired.” He did *surrender* the same, and for the very purpose herein indicated. The fact that particular shares were not segregated from the particular shares which were to be received by Lee was not of itself a breach of the contract nor a failure of performance. The manifest contemplation of the contract, as claimed by the plaintiff, was that the delivery of all shares should be to Ball for this very purpose. Ball and Lee and the son were acting together harmoniously and were all intending to be actively connected with the business, and they were actively connected therewith thereafter. The delivery by Conger to Ball was done in purported performance of the contract, and not as a purported tender. Lee knew it both from Ball and from Conger. He was so advised by Conger’s letter of November 12th. Yet he made no objection and raised no question for a period of nearly one year, and after the completion of a season of business.

Treating the contention of defendant at this point as a question of fact, all these circumstances were proper for the consideration of the jury and tended strongly to support the adverse finding.

III. It is contended for the defendant that the contract as contended for by the plaintiff was within the statute of frauds. Objections along this line were made to the evidence throughout the trial, and the point is now pressed upon our attention. If the plaintiff were suing upon a contract wholly executory, there might be some ground for this contention. But the plaintiff alleged full performance of the contract on his part. His evidence was sufficient to justify a finding of such full performance. He could not have recovered at all under the issues without a finding of such full performance on his part. This of itself necessarily disposes of any question of the statute of frauds. If the plaintiff were suing upon an oral contract wholly executory, tendering performance but alleging no actual performance on his part, a different question would be presented.

IV. Errors are assigned upon the giving of certain instructions. The grounds of the objections involve the same questions as are discussed in the foregoing divisions, and the claim of error is supported by the same discussion as we have already recited. What we have already said is decisive of these objections.

We find no error in the record. The judgment below must therefore be—*Affirmed*.

DEEMER, WEAVER and PRESTON, JJ., concur.

OLIVE L. DANIELS et al., Appellees, v. PHOEBE BUTLER et al., Appellees, and ERNEST LEWIS, Appellant.

**PLEADING: Form and Allegation—Allegation Governs Effect—Mis-
1 namer.** A pleading will be given effect according to its allega-

tions, not according to the particular name which the pleader sees fit to apply thereto. "Motion" for new trial properly treated as "petition" for new trial.

NEW TRIAL: Proceeding to Procure—Petition After Reversal—

- 2 **Equity Cause.** An appellee, who suffers a reversal in the Supreme Court in an equity case, may, upon entry of judgment against him in the lower court under *procedendo*, be granted a new trial under proper petition therefor. (Sec. 4092, Code, 1897.) A petition filed on the day when such latter judgment is entered is especially timely.

NEW TRIAL: Discretion of Court—Action for Recovery of Real

- 3 **Property.** The appellate court, always reluctant to set aside an order granting a new trial, is especially so *when the action is for the recovery of real property.* (Sec. 4205, Code, 1897.)

Appeal from Taylor District Court.—THOMAS L. MAXWELL,
Judge.

TUESDAY, JANUARY 18, 1916.

REHEARING DENIED FRIDAY, APRIL 7, 1916.

APPEAL from an order granting a new trial of this case.—
Affirmed.

Parker, Parrish & Miller, McCoun & Brant and G. B. Haddock, for appellant.

Frank Wisdom, W. M. Jackson, and Crum, Jaqua & Crum, for appellees.

PER CURIAM.—I. This is a motion or petition for a new trial of an equitable action for the partition of real estate, which action, upon its original trial in the district court, resulted in a decree finding against the defendant, Lewis, upon his cross-petition, in which he asserted title to all the real estate in controversy. Lewis appealed to this court, and the decree rendered by the trial court was reversed, in so far as Lewis' cross-petition was involved,

1. **PLEADING:**
form and allegation: allegation governs effect: misnomer.

and the cause was remanded to the district court for proceedings in harmony with that opinion. See *Daniels v. Butler*, 169 Iowa 65. Pursuant to these directions, a decree was entered in the district court on March 5, 1915. On the same day, the parties plaintiff, and all the defendants save Ernest Lewis, filed what they called a motion to vacate the judgment in part and for a new trial. They did not attach any affidavits thereto, and their prayer was that the part of the final decree finding in Lewis' favor on his cross-petition be vacated, and that a new trial be ordered on the issues tendered by his cross-petition. Lewis moved to strike this motion to vacate on many grounds: chiefly because it was not filed in time; because no such motion will lie in an equity case; and for the further reason that no new trial can be granted after a decree is ordered by this court. This motion to strike the motion was overruled by the district court, largely upon the theory that it made little difference what the original movant called his pleading; that, in his opinion, enough was stated in the pleading to make it a petition for a new trial; that he would so treat it, and he directed that the matter be heard upon testimony taken in open court. The case then went to trial, the allegations of the motion or petition being denied by operation of law, resulting in an order awarding a new trial of the main action, and the appeal is from this order.

As the appellees were successful in the court below, they had no occasion to present a motion for a new trial or a petition to vacate the original decree and judgment. Indeed, the district court, in such a situation, would not have entertained such a pleading. These appellees were not compelled to act until a decree was entered in the district court against them, and, when that was done, they on the same day filed their application to vacate the final decree and judgment. Surely their action was timely.

That a new trial may be had in the lower court either after an affirmance or reversal here is well settled by the

2. NEW TRIAL:
proceeding to
procure: peti-
tion after re-
versal: equity
cause.

authorities. See *Adams County v. B. & M. R. Co.*, 44 Iowa 335; *Chicago, Milwaukee & St. P. R. Co. v. Hemenway*, 134 Iowa 523, 525; *Chambliss v. Hass*, 125 Iowa 484; *Butterfield v. Walsh*, 25 Iowa 263; *White v. Poorman*, 24 Iowa 108.

It matters not, so far as this question is concerned, whether the action be at law or in equity. For a decree in an equity case may be set aside and a new trial given upon proper grounds, to the same extent, and with like effect, as a judgment at law may be. This is settled by the authorities cited. Whilst the pleading was denominated a motion, it had all the allegations essential to a petition for a new trial, and the trial court was justified in treating it as a petition and hearing it as such. Had the motion to strike it been sustained, because a motion is not proper in such circumstances, a somewhat different question would have been presented. As the court announced, it would be treated as a petition and tried accordingly, and as the parties did so treat it, it was not necessary that the movant give the paper another name by amendment or otherwise.

II. On the merits, we feel that little should be said at this stage of the proceedings. Such a motion or petition is addressed to the sound discretion of the trial court, and we

3. NEW TRIAL:
discretion of
court: action
for recovery of
real property.

are less disposed to interfere when the application is sustained than when it is denied. In the former instance, a new trial is had and the matter heard upon its merits upon all the testimony; while in the latter, the case is at an end. The cross-petition tendered by defendant Lewis raised a direct issue as to the title to the land in controversy, and even a greater latitude is allowed in such cases than in ordinary actions. Indeed, in actions to recover real property proper, the trial court, in its discretion, may grant a new trial upon an application made within one year, and upon other grounds than those necessary to secure it generally. Sec. 4205, Code, 1897. With these rules in mind, we have carefully examined the record, and are satisfied that the trial court did not abuse its discretion in granting a new trial of the

case. This memorandum opinion is now filed for the purpose of expediting the final trial of a case which has been pending for many years. The order, therefore, is—*Affirmed*.

EVANS, C. J., DEEMER, WEAVER and PRESTON, JJ., concur.

W. H. EWING, Appellee, v. C. E. HATCHER, Appellant.

EVIDENCE: Opinion Evidence—“Appearance” of Person. How a
1 person “appeared”—for instance, that his face appeared flushed,
as though he was intoxicated—is the statement of a fact.

EVIDENCE: Opinion Evidence—Intoxication. The fact of intoxi-
2, 8 cation may be shown by one who has observed the conduct and
appearance of the person in question and describes the same; how-
ever, as a seeming departure from the general rule, a preliminary
detail of the appearance and conduct of the person in question is
not necessary.

EVIDENCE: Res Gestae—Motives and Intention. All declarations,
3 acts and exclamations uttered by the parties to a transaction, which
are contemporaneous with and accompany it, and are calculated to
throw light upon the motives and intentions of the parties to it,
are admissible as part of the *res gestae*. So held as to what de-
fendant *said* and *did* at the time of an alleged assault on plaintiff.

EVIDENCE: Opinion Evidence—Functional Action of Body. Whether
4 normal functional action of a visible organ of the body, having
functions peculiarly its own, was interfered with in a specified way
by a certain described wound, is a statement of fact and not opinion
by the one suffering the injury.

EVIDENCE: Res Gestae—Expressions of Pain. Complaints of pain
5 immediately following an injury are competent.

WITNESSES: Privileged Communications—Stenographer. A com-
6 munication by an employer to his stenographer is not privileged
unless made (a) by reason of the employment, (b) confidentially
and (c) because necessary and proper to enable such employee to
discharge her usual duties. (Sec. 4608, Code, 1897.)

PRINCIPLE APPLIED: Defendant was accused of having made
an assault on plaintiff. Defendant stated to his stenographer that
she should tell the plaintiff to come up; that he would treat him
all right if he came to his house; that he thought perhaps he had
been a little hasty, and perhaps they had both been wrong and they

had better get together and fix it up. The nature of the employment and duties of the stenographer does not appear further than the inference from the term "stenographer." The court says: "The matters * * * had no relationship to the duties imposed upon her as such, nor was the communication made to her in the capacity of stenographer." *Held*, communication not privileged.

EVIDENCE: Admissions—Offer of Compromise. Certain statements
7 of defendant held not to constitute an offer of compromise.

EVIDENCE: Opinion Evidence—Intoxication.
2, 8

EVIDENCE: Opinion Evidence—Experts—Cross-Examination. In
9 the cross-examination of an expert, it is not necessary that the examiner confine himself to the facts established in the case. He may assume almost any state of facts for the purpose of testing the credibility of the witness and the extent of his knowledge.

Appeal from Marshall District Court.—B. F. CUMMINGS,
Judge.

SATURDAY, NOVEMBER 20, 1915.

REHEARING DENIED FRIDAY, APRIL 7, 1916.

ACTION to recover damages for injuries sustained by plaintiff on account of assault and battery alleged to have been committed by the defendant. Judgment for the plaintiff. Defendant appeals.—*Affirmed*.

F. E. Northup, for appellant.

Carney & Carney, for appellee.

GAYNOR, J.—This is an action to recover for personal injuries alleged to have been the result of an assault made upon the plaintiff by the defendant. The defense is that plaintiff was the aggressor, and that whatever injuries he received were inflicted by the defendant in defense of his own person. The cause was tried to a jury, and a verdict rendered

for the plaintiff. Judgment being entered upon the verdict, defendant appeals.

In considering the errors complained of and upon which reversal is sought, we do, because of the manner in which the record is presented, confine ourselves only to those points touched on by the defendant in argument. Those pointed out upon which no argument is made, and concerning which no reason for reversal is given, we pass without comment. Counsel, in presenting the case, refers to the pages of the abstract upon which testimony complained of may be found. Turning to these pages, we do not find the evidence complained of in the argument upon the pages referred to, and it has been necessary for us to search through the record for the particular matter to which reference is made.

The first error relied upon involves the action of the court in admitting certain testimony over the objection of the defendant, and in sustaining objections to testimony offered by the defendant. In presenting these questions in his brief, counsel has evidently overlooked the rule, or has abandoned himself to a freer method than the rules prescribe. In presenting a record in which he claims these errors appear, defendant pursued the following method:

1. EVIDENCE: opinion evidence: "appearance" of person.
"There was error in admitting over defendant's objection, the following testimony appearing on pages 10 and 11 of the abstract."

Here counsel sets out the testimony as it appears upon the abstract, with the rulings of the court complained of without comment. Turning to the abstract, we find that a witness who was present at the time of the encounter which resulted in the injuries complained of, was asked as to defendant's appearance at that time,—how his face appeared. The answer was: "Why, his face was flushed as though he had been drinking." This was objected to and the objection overruled. The portion of the answer "as though he had been

drinking," defendant moved to have stricken out. This also was overruled.

The evidence is abundant that the defendant had been, in fact, drinking. He denies that he was intoxicated, but that he had been drinking is not disputed. The controversy touching which this testimony was offered arose out of the fact that the defendant claimed that the plaintiff was the aggressor, while the plaintiff claimed that the assault was unprovoked. The appearance of the defendant at the time of the assault was competent and material. The question called for a fact, though in one sense the opinion of the witness. It was a statement of fact as to how the defendant appeared to the witness at the time.

Whether a person is intoxicated or not may be proved by a witness who has observed his conduct and his appearance at the time. The appearance of a person at a particular time

2. EVIDENCE:
opinion evi-
dence: intoxi-
cation.

can only be made manifest to the jury through the testimony of one who saw him at the time—one who observed and can describe his appearance. This kind of testimony has been recognized as competent. It has been presented in many ways. Many phases of this kind of testimony have been considered by the court. Whether a man is intoxicated or not is evidenced by his appearance, and one who has observed his appearance is competent to testify to the fact. The application of this rule in its general scope may be found in *Vannest v. Murphy*, 135 Iowa 123; *Yahn v. City of Ottumwa*, 60 Iowa 429; *Bizer v. Bizer*, 110 Iowa 248; *State v. Huxford*, 47 Iowa 16; *Winter v. Central Iowa R. Co.*, 74 Iowa 448.

The next complaint is stated in the following language:

2. EVIDENCE: res
gestae: motives
and intention.

"The court erred in admitting the following testimony. See pages 12, 13 and 14 of the abstract."

Here the defendant sets out certain testimony with the rulings of the court. An examination of the abstract shows

that the complaint relates to the action of the court in permitting witnesses to state what the defendant said at the time that it is claimed he made the assault. We will not set the language out. It appears from the testimony of these witnesses that the defendant applied vulgar and opprobrious names to the plaintiff at the time of the assault. The words were a part of the act, accompanied the act, and were suggestive of the state of defendant's mind at the time that the act was committed.

The other testimony complained of relates to what the defendant did, the witness stating that he noticed the defendant had his hand in his pocket, "and this was suggestive to me, knowing he had left the room prior to that time." The last part of the answer was stricken out, to wit, "It was suggestive to me, knowing that he had left the room prior to that time." The rest was clearly competent as a description of an action of the defendant at the very time that the assault was made. No authority need be cited to support the ruling of the court.

We will not attempt to review all the attempted assignments of error in the introduction of testimony. Some are so clearly without merit that we may be permitted to express some surprise that they are urged here at all.

The next question complained of relates to the action of the court in permitting the plaintiff, when upon the stand, to answer the following question: "Did the injury interfere

with the functions of the part alleged to have been injured, in any way?" The answer was that it does. The question was objected to on the ground that it called for the opinion of the witness as to the cause of the injury, and the witness was not an expert. The part affected had functions peculiarly its own. That the injury interfered with normal functional action was a matter that the witness who suffered the injury was in a position to know and appreciate better than anyone

4. EVIDENCE:
opinion evi-
dence: func-
tional action of
body.

else. It was a matter that was peculiarly within his own knowledge. The testimony disclosed his condition before and after the injury. He described minutely wherein the organ after the injury refused to perform its natural function. There was a visible injury upon the part affected—an injury that could be recognized by the eye. He said that the functional action was different since the injury. He had already testified to the place and character of the injury. The question was asked with reference to the injury complained of. The jury could not have been misled into thinking, under this whole record, that the plaintiff as an expert was giving independent testimony as to the effect of an injury to the part of the human anatomy on its functional action. His testimony related to himself, to the injury received, to the effect that it had upon him, so far as he understood it and saw it. We see no prejudicial error in this ruling. When counsel asked the witness what effect the injury had upon the functional action of the part affected, he called for the knowledge of the witness of that fact as the fact was manifest in his person.

The next complaint is in this language: "The court erred in admitting incompetent testimony. See abstract pages 33 and 34." Upon these pages, we find that the court, over the objection of the defendant, permitted the plaintiff's wife to testify as follows:

5. EVIDENCE: *res gestae*: expressions of pain.

"To what extent, if any, did your husband complain of pains in the affected part? A. Well, I do not hardly remember about the pains. He just complained of pain. Q. State whether or not he used a cane in walking. A. Yes, sir."

We are not favored with any argument on this proposition, nor is any reason given why that testimony is not competent. It relates to a time immediately following the injury. The authorities are abundant sustaining the action of the court.

It is next complained that one Minnie E. Allen was per-

mitted to testify as to certain statements made by the defendant. She was, at the time, the defendant's stenographer.

6. WITNESSES:
privileged com-
munications:
stenographer.

It was claimed that statements made to her were privileged, and that one cannot be permitted to divulge a privileged communication.

It is true that she was doing work for him as a stenographer at the time, but the matters testified to by her had no relationship to the duties imposed upon her as such, nor was the communication made to her in the capacity of stenographer. The statute relied upon is Section 4608, Code Supp., 1913. The inhibition relates to confidential communications properly intrusted in a professional capacity, and necessary and proper to enable one to discharge the functions of his office according to the usual course of practice or discipline. The matter testified to by the witness of which complaint is made related to a statement made by the defendant to her in which he said that she should tell the plaintiff to come up; that he would treat him all right if he came to his house; that he thought perhaps he had been a little hasty, and perhaps they had both been wrong, and they had better get together and fix this up. The record does

7. EVIDENCE: ad-
missions: offer
of compromise.

not disclose when this was said by the defendant. Some claim is made that this is an offer of compromise, and therefore should be excluded. We do not so construe it. We find no error here.

The next complaint is of the testimony of this same witness given touching the condition of Hatcher, as to being intoxicated at the time of the assault. The question was asked

her, "How soon did you see Mr. Hatcher

8. EVIDENCE:
opinion evi-
dence: intox-
ication.

after the meeting of the men on this evening (referring to the evening when the claimed assault was made)? A. Well, I should say

about five minutes; not over ten minutes at the most." She was then asked, "What was his condition at that time in so far as being under the influence of intoxicating liquor? A.

Well, Mr. Hatcher was pretty thoroughly intoxicated at the time."

No reason is urged why this evidence is not competent. We do not consider that the action of the court in admitting this testimony ought to be even the subject of criticism. See *State v. Huxford*, 47 Iowa 16.

Some complaint is made of the action of the court in admitting the testimony of Dr. Conaway, called on the part of the plaintiff. We have examined this testimony and find nothing in the record that requires any consideration at our hands.

It is next contended that the court erred in permitting counsel for plaintiff, on the cross-examination of Dr. Cheshire, to propound questions which, in their nature, were not proper to be propounded on cross-examination, in

9. EVIDENCE:
opinion evi-
dence: experts:
cross-examina-
tion.

that the inquiry extended beyond the direct examination, and assumed facts which were not supported by the testimony. This objection might be good if the examination were in chief, but an entirely different rule obtains in the cross-examination of an expert. Where one is called as an expert, the cross-examination need not be confined to the matters drawn out on direct examination. Other matters, independent matters, may be inquired into for the purpose of testing his knowledge and skill as an expert. See *Taylor, Admr., v. Star Coal Co.*, 110 Iowa 40. In this case, it was urged that, in cross-examination of some of defendant's expert witnesses, questions were asked which assumed a state of facts not in the evidence. The court said:

"In cross-examining such a witness, it is not necessary that the examiner confine himself to the facts established in the case. He may assume almost any state of facts, for the purpose of testing the witness' credibility and the extent of his knowledge."

This same objection is urged in the cross-examination of Dr. Harris, who was called on the part of the plaintiff, and

the same reason urged for its exclusion. In neither case can the objection be sustained.

Defendant urges further error in the giving of the seventh, eighth and tenth instructions given by the court to the jury. We have examined these instructions and find no error in them, and they have support in the record.

On the whole record, we think the judgment must be sustained. No reversible error appearing, the cause is—*Affirmed.*

DEEMER, LADD and SALINGER, JJ., concur.

EXCHANGE NATIONAL BANK, Appellee, v. T. F. McCaffery,
Sheriff, Appellant.

CARRIERS: Carriage of Goods—Bills of Lading—Indorsement—Attachment—Priority. A holder of a properly indorsed bill of lading, as collateral security for advances made to pay the draft attached thereto, is superior in right to an attaching creditor of the consignee.

PRINCIPLE APPLIED: Cochran, on August 19th, bought a carload of corn at Council Bluffs. The seller shipped the corn to itself or order at Little Rock, with directions to notify Cochran. It indorsed the B/L in blank, attached a sight draft for the purchase price and sent same to Little Rock for collection, at which latter place they arrived on August 22d. Cochran, on August 22d, took up the B/L and draft by his personal check, O.K.d by his bank, plaintiff herein, and, on the same day, delivered the B/L to his said bank, together with his note for a slightly smaller amount than the check. This was pursuant to a standing arrangement between Cochran and his bank, by which, in such cases, the bank O.K.d Cochran's check, advanced the money, and took the B/L as collateral. On August 22d and 23d, Cochran was overdrawn at the bank. In taking the O.K.d check to the collecting bank and taking up the B/L and in delivering it to the bank, Cochran was acting for the bank. On the afternoon of August 23d, creditors of Cochran attached the corn in the railroad yards at Council Bluffs. Plaintiff learned of this attachment on August 27th. *Held*, plaintiff's right to the corn was prior to that of the attaching creditors.

FRAUD: Evidence—Degree of Proof. The following principles are
2 recognized:

1. Fraud will not be presumed; nor will it be inferred from circumstances which, in the light of the entire case, are consistent with honesty.

2. Proof of fraud must be clear, satisfactory and convincing.

Evidence reviewed, and held insufficient to show fraud in the claim of a bank to a bill of lading, with consequent right to the property prior to an attaching creditor.

FRAUD: Evidence—Taking Security from Responsible Party. Tak-
3 ing collateral security from a responsible party is not evidence of fraud.

PLEADING: Amendments—Failure to Request Continuance—Waiver.

4 If no continuance is asked on account of an amendment, complaint cannot afterwards be made that time was not granted.

TRIAL: Verdict—Form of Verdict—Inaccurate Terms. The use of
5 inaccurate terms in preparing forms of verdict for the jury will be treated as harmless, when the form as a whole is clear.

Appeal from Pottawattamie District Court.—O. D. WHEELER,
Judge.

FRIDAY, APRIL 7, 1916.

THIS is an action at law brought by plaintiff against the defendant as sheriff of Pottawattamie County, Iowa, to replevin a certain carload of corn then in the custody of said sheriff under a writ of attachment issued by the district court of Pottawattamie County, Iowa, in a case then pending therein brought by the Cavers Elevator Company against one H. K. Cochran. There was a trial to a jury, and, at the conclusion of the testimony, the defendant moved for a verdict in his favor, which was overruled. Plaintiff also filed a motion for a directed verdict in his favor, which was sustained. It is conceded that the value of the corn was \$556.28. The verdict and judgment was that plaintiff was entitled to the possession of the property and that the value was \$556.28, and that the interest of the bank therein is that of bailee to the extent of \$609 and interest at six per cent. from August 22d, 1910.

The \$609 represents the amount of a note given to plaintiff. From the judgment against defendant, he appeals.—*Affirmed.*

W. C. Lambert and John J. Hess, for appellant.

Saunders & Stuart, for appellee.

PRESTON, J.—It is conceded by appellant there is no dispute as to the law, and the propositions are as to whether there was sufficient evidence to take the case to the jury.

The testimony shows without any substantial dispute that H. K. Cochran was engaged in the grain business at Little Rock, Arkansas. About August 19, 1910, he arranged with the Union Grain & Elevator Company to sell him a carload of corn to be shipped over the Rock Island line from Council Bluffs to Little Rock, Arkansas. The corn was placed in the car and consigned by the elevator company to its own order at Little Rock, with instructions to notify H. K. Cochran. The Union Grain & Elevator Company indorsed the bill of lading in blank, and this was attached to the sight draft. The sight draft, with bill of lading attached, was deposited with the Merchants National Bank of Omaha, and by it transmitted to the German National Bank at Little Rock. It was the practice of the plaintiff bank, in its dealings with Cochran, to place its O. K. upon checks drawn by Cochran, and these checks were in turn used for the purpose of taking up bills of lading and drafts. This O. K. of the check was for the purpose of enabling the banks to make prompt remittance without waiting for the checks to clear through the clearing house.

The defendant offered practically no evidence, and attempted to make its case upon the cross-examination of plaintiff's witnesses and interrogatories attached to its amended and substituted answer. In other words, as appellant says, he was compelled to go into the camp of his enemies for his testimony.

The testimony of the witness Cochran and of Rather, who

was cashier of the bank at the time of the transaction, was that an agreement existed between plaintiff and Cochran, by which it O. K.d the checks given by Cochran to take up sight drafts where bills of lading were attached, and that the bills of lading became the property of the bank as collateral security for the money advanced by the bank to take up the sight draft and bill of lading. When this sight draft, with bill of lading attached, arrived at Little Rock on the 22d day of August, Cochran drew a check upon the plaintiff bank, which was O. K.d by it. He went to the German National Bank and took up the bill of lading. The carload of corn had not then left Council Bluffs, as it was attached by the Cavers Elevator Company on the afternoon of the 23d day of August in the railway company's yards at Council Bluffs, on a debt claimed to be due it from Cochran. On the 22d day of August, Cochran gave to the bank his demand note in the amount of \$609, payable to the order of the Exchange National Bank. The note was taken for a smaller sum than the amount of the check, because it was the custom of the bank to require a margin on corn to be covered by other securities when the full amount of the draft is advanced. Cochran testified, and there is no dispute about it, that he had a general agreement with the bank that he was to furnish them collateral for moneys advanced in this way, and that the bill of lading, or other satisfactory security, must be furnished upon these and other transactions. Cochran states that his place of business was some distance from the plaintiff bank, and that it was his practice to take the securities to this bank, including bill of lading, after they were received from the bank holding the sight draft and bill of lading. After the attachment was issued, plaintiff replevined the corn in this proceeding, shipped it to its own order at Little Rock, sold the corn and applied the proceeds upon the note, the amount realized not being sufficient to cover the face of the note. Cochran's account was overdrawn on the morning of the 22d of August. During the 22d, he deposited \$1,561.76 to his credit, leaving

a net balance, as shown by the bank books, of \$976.91 at the close of business; but on the same day, the bank O. K.d Cochran's checks in payment of drafts to the amount of \$2,971. These checks that were O. K.d were not charged against his account until they were paid through the clearing house; and, on the morning of the 23d of August, at the opening of business, Cochran's account was overdrawn in the sum of \$2,966.01. The bank was not advised of the attachment until the 27th day of August.

1. The first proposition is as to whether the plaintiff bank was the owner of this bill of lading, or entitled to its possession, at the time the levy was made by the officer under the attachment in question. It is contended by appellant that, upon the taking up of the bill of lading for the corn with the German National Bank on August 22d by Cochran, the corn became his property and was attachable in the hands of the railroad company as such for a debt owed by him; and he cites *Forcheimer v. Stewart*, 65 Iowa 593, and *Cragun v. Todd*, 131 Iowa 250, 252, to the proposition that title to property passes to the purchaser when the bill of lading of property consigned to the shipper, with draft attached, is taken up by the purchaser. But, under the undisputed evidence, it appears that, when Cochran took up the bill of lading, he was acting as the agent for the plaintiff.

It is appellee's contention that a bill of lading, when properly indorsed, is symbolic of the property and by transfer passes title to the holder, citing *Schlichting v. Chicago, R. I. & P. R. Co.*, 121 Iowa 502; *Shaffer v. Rhynders*, 116 Iowa 472; *First National Bank v. Mt. Pleasant M. Co.*, 103 Iowa 518; *Anchor Mill Co. v. Burlington, C. R. & N. R. Co.*, 102 Iowa 262, 266; *Garden Grove Bank v. The Humeston & S. R. Co.*, 67 Iowa 526, 533. And further, that the fact that a bank which had received a draft with bill of lading attached, as security for a loan for the purchase of property shipped, had obtained a guarantee from the consignee that the draft would

1. CARRIERS: carriage of goods: bills of lading: indorsement: attachment: priority.

be paid, does not release its lien as holder of the bill of lading, and the bank may enforce the same as against an attaching creditor of the borrower, citing *Shaffer v. Rhynders, supra*.

As before stated, the bill of lading for the corn was attached to the sight draft and indorsed in blank; and on August 22d, Cochran, against whom the sight draft was drawn, drew a check payable to the order of the German Bank to the amount of the draft, and then took the sight draft to plaintiff's bank and had it O. K.d under the arrangement before stated. Cochran's check was approved, in conformity with this practice. This check was in fact paid by the bank on the morning of the 23d of August, and the corn was attached at Council Bluffs on the afternoon of the 23d. It has been the holding of this court under the authorities before stated that a bill of lading is symbolic of the property, and that the bill of lading, when indorsed and delivered, passes the title to the property; so that plaintiff bank had the right to advance the money to take up this draft and to receive the note of Cochran and to take the bill of lading as collateral security for the payment of the note; so that plaintiff bank would be the lawful owner of the bill of lading and the carload of corn which it symbolized, unless it has been shown by the defendant that there was fraud in the transaction between Cochran and the Exchange National Bank.

2. The next proposition, then, is as to whether there was sufficient evidence of fraud to take the case to the jury. At the risk of some repetition, it will be necessary to state again

some of the facts bearing upon this point.

2. FRAUD: evidence: degree of proof. It is shown that Cochran had a contract with

the bank permitting him to check on it for the purpose of taking up drafts with bills of lading attached for grain purchased by him, and by this agreement Cochran was required to deposit the bills of lading, or other satisfactory collateral, in lieu thereof, to be approved and accepted by the bank to secure the amount thus checked out. Cochran's standing with the bank was good. On the morning of August

22d, Cochran was overdrawn \$556.57. A number of drafts came in for payment on that date, including the one under consideration. Cochran drew his check in the sum of \$636.64 to the order of the German National Bank. The cashier placed his O. K. upon the same. Cochran took the bill of lading and the draft out of the bank; but, under the agreement with the plaintiff bank, plaintiff became the owner of and was entitled to have the bill of lading turned over to it. The evidence shows that the bill of lading was turned over to the bank, and that the bank did not know until the 27th of August that the car of corn had been attached at Council Bluffs.

Rather, the cashier of plaintiff bank, testifies that:

"When Cochran delivered the check to the German National Bank, he took up the draft, with the bill of lading attached, acting for us and as our agent. He brought the bill of lading to us to be held by us as security, according to our agreement."

There is some evidence tending to show that, after the bill of lading was delivered to the plaintiff bank, the bill of lading was deposited with the agent of the railroad company by Cochran, as agent for the plaintiff, and with its consent, with the understanding that the plaintiff bank was the owner of the car of corn, and prior to the time that the corn was attached. The reason for this was to have the car delivered as soon as it came in, to Mr. Cochran, acting as agent for plaintiff. But we think this is not very material, because the bill of lading had been delivered to plaintiff and it was entitled to possession of the same at all times.

Plaintiff's cashier also testifies that Cochran, at the time the check was approved, on the 22d of August, deposited his demand note in the sum of \$609. Cochran also testifies that after he took the bill of lading he delivered the same to the plaintiff bank and attached to it his note for \$609.

This is the substance of the testimony from which defendant claims there was fraud and collusion between plaintiff and Cochran, by which plaintiff was attempting to aid Cochran

in concealing and protecting his property from the claims of creditors. It is thought that, under the circumstances shown, there might be inferences drawn that are suspicious. But fraud is not presumed, nor can it be inferred from circumstances which, in the light of the entire case, are consistent with the theory of integrity and fair dealing between the parties. The burden of proof to establish fraud is upon the party pleading the same. *Shaffer v. Rhynders, supra*. See *Ley v. Metropolitan Life Ins. Co.*, 120 Iowa 203.

The facts constituting fraud must be established by proof that is clear, satisfactory and convincing. *Ley v. Metropolitan Life Ins. Co.*, 120 Iowa, at 209.

In the *Shaffer* case, *supra*, the bank with which the bill of lading was deposited took additional security, and it was claimed that such was evidence of fraud. It is claimed in the

instant case that the fact that Cochran was financially responsible is evidence of fraud. But we think that the fact that a bank takes collateral security from clients that are responsible is not evidence of fraud.

In our opinion, the evidence was not sufficient to require the submission of the case to the jury on the question of fraud. If it had been so submitted, and the jury had found the transaction fraudulent, such a verdict would not have had sufficient support in the testimony.

3. Appellant complains that the court erred in permitting plaintiff to amend its petition after the evidence was closed and both parties had moved for a directed verdict.

They say that an amendment changing the issues materially entitles adverse party to a continuance, and they cite *Herrstrom v. Newton & N. R. Co.*, 129 Iowa 507, and other cases.

In the original petition, plaintiff alleged that it was the absolute and unqualified owner of the corn, but the depositions taken in the case and the interrogatories which were answered showed that the interest of plaintiff was a

qualified one, and the case seems to have been tried upon that theory. After the amendment was filed, defendant moved to strike it from the files, and the motion was overruled. The amendment changes the language of the petition to some extent, and, as stated, alleges a qualified interest rather an unqualified ownership. The action is in replevin, and in some instances a party may be entitled to the possession of property without being the absolute owner; but, in any event, under all the circumstances, we think there was no abuse of discretion upon the part of the trial court. The defendant did not move for a continuance. Code Section 3602 provides that the cause shall not be continued unless a request is made for a continuance. And it was held, in *Wyland v. Mendel*, 78 Iowa 739, that after an amendment, if a continuance is not demanded, the party may not complain.

Criticism is made because the court, in preparing the form of verdict, used the word "bailee." But the form of the verdict is clear, and shows that the interest of plaintiff was a qualified one; and the jury could not have been misled by the use of this word, whether it was a correct use or not. In fact, the matter is not seriously urged.

Some other minor points are argued, but they are covered by what has been said in the discussion of the other points.

We are of the opinion that the judgment of the district court was right, and it is, therefore—*Affirmed*.

EVANS, C. J., DEEMER and WEAVER, JJ., concur.

SHERM FAGG, Appellee, v. MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY et al., Appellants.

CARRIERS: Carriage of Passengers—Assault on Passenger by
 1 **Brakeman.** A carrier is responsible in damages for an assault on a passenger committed by the carrier's brakeman for the purpose of punishing an affront personal to the brakeman.

ASSAULT AND BATTERY: Justification—Abusive Words—Car-
2 **riers.** Mere words, no matter how abusive or insulting, do not
justify an assault, but may and should be, in a proper case, consid-
ered in mitigation of damages.

TRIAL: Instructions—Form, Requisites and Sufficiency—Correct
3 **Though Inexplicit.** The right to explicit instructions will be con-
sidered waived in the absence of a request therefor, when the in-
structions given are correct as far as they go. So *held* as to in-
structions governing matters in mitigation of damages.

TRIAL: Argument—Opening and Closing—Determination of Right.
4 The right to open and close an argument is usually controlled by
the pleadings. *Held*, motion made at the close of all the evidence,
that defendant be granted the right to open and close, was properly
denied, the record then showing serious dispute as to issues on
which plaintiff, under the pleadings, had the burden of proof.

TRIAL: Special Interrogatories—Non-Controlling Matters. Special
5 interrogatories, calling for non-controlling matters and matters
not of ultimate fact, are properly refused.

Appeal from Marshall District Court.—B. F. CUMMINGS,
Judge.

FRIDAY, APRIL 7, 1916.

ACTION at law to recover damages from defendant rail-
way company and C. A. Burtchby, a brakeman, for an assault
committed by said brakeman upon plaintiff while a passenger
on one of the trains of the railway company. Many defenses
were pleaded, which will be noticed in the body of the opinion.
Upon trial to a jury, a verdict of \$300 was returned for plain-
tiff, and defendants appeal.—*Affirmed*.

C. H. E. Boardman, W. H. Bremner and F. M. Miner, for
appellant.

Davis & Cameron and C. H. Van Law, for appellee.

DEEMER, J.—I. Plaintiff was a passenger upon one of
defendant railway company's trains from Marshalltown to
Gifford. He boarded the train in an intoxicated condition and
went to the forward end of the car, taking a seat which was
within two or three seats from the water-closet of the car. He

wished to use this closet, but found it locked, until finally the brakeman came through and unlocked it for him. At that time, plaintiff complained to the brakeman of the way he was performing his duties and they had some trouble, verbal or otherwise, before plaintiff went into the closet. As he was entering the closet, the brakeman was leaving the car to go about his work, and he (plaintiff) then called the brakeman a vile name. Plaintiff went into the closet and the brakeman into the baggage car, and it so happened that, as plaintiff came out from the closet, the brakeman was again entering the coach by the front door, and they met at the forward end of the car. What then happened is a matter of serious dispute. According to plaintiff's contention, he had resumed his seat, and the brakeman, angered because of the vile name applied to him, dragged him therefrom out in the aisle of the car, pushed and jammed his head against the corner of the water-closet or the front end of the car, struck him with his fist, and demanded that he take back what he said, and kept striking him on the face and head until he finally took it back, and, after he had received this punishment, the brakeman and the newsboy, who was close at hand, carried or pushed him in a limp condition into a seat in the car, where he remained until he reached his destination, and, at the suggestion of an attorney, upon whom he called, went to a doctor's office, where his wounds were dressed. According to defendant's version, when the two men met at the front of the car after plaintiff came from the water-closet, plaintiff pushed the brakeman to one side of the car and toward, if not against, the stove, and the brakeman then got back of the plaintiff and pushed him against the front end of the car and there pushed and struck him two or three times, demanding that he recant his statement, which he finally did, and the plaintiff thereafter, without any assistance, resumed the seat he had taken when he entered the car. It is admitted that plaintiff was intoxicated, and practically admitted that the brakeman struck and punished the plaintiff because of the offensive remark

made of him (the brakeman) and demanded that he (plaintiff) take it back. The case was submitted on the theory that both defendants were liable for the assault, unless it was justifiable in defense of the person of the brakeman; and that the offensive remark made by plaintiff was no justification for the assault, although such remark might be considered in mitigation of damages.

Appellants challenge this theory of the case, basing their argument upon the proposition that, if the brakeman committed the assault because of the offensive remark by plaintiff, he did so for his own purposes, and not as an agent or servant of the defendant railway company, and that, as such an assault was outside of the scope of his employment, the defendant railway company is not responsible.

1. CARRIERS: carriage of passengers: assault on passenger by brakeman.

There are some old cases which adhere to this doctrine. *Peavy v. Georgia R. & Bkg. Co.* (Ga.), 12 Am. St. Rep. 334; *Wise v. South Covington & C. R. Co.* (Ky.), 34 S. W. 894; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110 (2 Am. Rep. 373). But the great weight of modern authority is to the contrary. See *Nesbit v. Chicago, R. I. & P. R. Co.*, 163 Iowa 39, and cases cited; *Garvik v. Burlington, C. R. & N. R. Co.*, 131 Iowa 415; *Ray v. Chicago & N. W. R. Co.*, 163 Iowa 430; *Neuer v. Metropolitan Street Ry. Co.* (Mo.), 127 S. W. 669; *Baltimore & Ohio R. Co. v. Barger* (Md.), 26 L. R. A. 220. Indeed, the Georgia court itself has come to the modern rule and overruled its previous decision, heretofore cited, in *Mason v. Nashville, C. & St. L. R. Co.*, 33 L. R. A. (N. S.) 280 (135 Ga. 741). See also *Birmingham Ry. & Electric Co. v. Baird* (Ala.), 54 L. R. A. 752. An all-sufficient reason for the modern rule is that a railway company as a carrier of passengers is bound to the exercise of care to protect from assaults, whether by strangers or others, those who take passage, and it is no answer to say that the assault was committed by one without authority, even if that one be one of its own employees. See cases heretofore cited.

II. But one of the instructions given by the trial court was excepted to, and that reads as follows:

"No words alone, however opprobrious or insulting, will justify an assault and battery by the person to whom they are addressed, but the words and the circumstances and the manner in which they are uttered may be considered by the jury in mitigation of any damage to which the plaintiff would be entitled. Even if the plaintiff attempted to strike the brakeman, Burtchby, this would not justify the latter in doing more than was reasonably necessary to protect himself from the assault."

The exception was upon the ground that abusive or opprobrious words applied to a brakeman might be such as to relieve his master from liability, on the theory that, in avenging the assault, the brakeman alone would be responsible. As we have already observed, the law premise in the argument is faulty.

Mere words, no matter how abusive, or insulting, do not justify an assault; but, as the trial court said, they may and should be considered in mitigation of damages. See cases heretofore cited, and *Shoemaker v. Jackson*, 128 Iowa 488; *Lund v. Tyler*, 115 Iowa 236. Defendants asked no instruction on the question of mitigation of damages, and did not except to the one given because it did not adequately cover that proposition; hence they are in no position to complain.

III. After all the testimony was adduced in the regular way as if plaintiff had the burden of proof, as he undoubtedly did under the pleadings, defendants asked the right to open and close the argument. This was denied, and in this there was no prejudicial error. At that time, there was a serious dispute in the testimony regarding the nature and extent of plaintiff's injuries, and as to whether or not there was any such assault as plaintiff complained of. The

2. ASSAULT AND BATTERY: justification: abusive words: carriers.

3. TRIAL: instructions: form, requisites and sufficiency: correct though inexplicit.

4. TRIAL: argument: opening and closing: determination of right.

burden was on plaintiff to show the nature and character thereof, and, after that was settled, the burden was doubtless on defendants to show the mitigating circumstances, or the justifiable character of the assault. *Woodward v. Lavery*, 14 Iowa 381. As a rule, the right to open and close is not determined by the evidence adduced, but by the pleadings. Although there are doubtless some exceptions to the rule, no such exceptions appear in this record.

IV. Defendants asked the court to submit a number of special interrogatories, which were refused. As answers thereto would not have been controlling, no matter whether in the affirmative or the negative, and as they did not call for ultimate but really evidentiary facts, there was no error here. *Engvall v. Des Moines City R. Co.*, 145 Iowa 560; *Morbey v. Chicago & N. W. R. Co.*, 116 Iowa 84, and cases cited.

V. Some rulings on testimony are complained of, but upon examination we find no prejudicial errors. If any were committed, they were corrected before the evidence was closed. It is unnecessary to specifically refer thereto, as they raise no new or doubtful questions. The verdict is small and has ample support in the testimony, and the judgment must be, and it is—*Affirmed*.

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

JAMES FOLEY, Appellee, v. FRANK A. NIMOCKS, Appellant.

PRINCIPAL AND AGENT: The Relation—Purchasing Property for

- 1 **Another—Sales.** A contract by which one party agrees to purchase personal property for the other and the other agrees to receive it and pay the price on delivery, is a contract of agency for such purchase, not a contract for the sale of the property, and manifestly so where the party making the purchase is acting for the other and not for himself. So *held* in a transaction involving the purchase of corporate stock.

SALES: Transfer of Title—Purchase for Another. Personal property purchased by one in his own name, with his own funds, but purchased for another at such other's request and under an agreement to reimburse the one purchasing, belongs to the one for whom purchased. So held in the purchase of corporate stock.

PRINCIPAL AND AGENT: Rights of Agent—Reimbursement for Losses, Etc. A principal is under obligation to reimburse his agent for all good-faith disbursements made and losses suffered in the proper execution of the agency.

PRINCIPLE APPLIED: Plaintiff purchased in his own name and with his own funds certain corporate stock, doing so at defendant's request and on defendant's promise to take up such stock and pay plaintiff therefor, with interest, at a certain time. Later, the corporation became insolvent, and, by reason of irregularities in its organization, plaintiff, along with other stockholders, was compelled to pay to creditors of the corporation an additional amount on his stock. Held, the contract created the relation of principal and agent, and that defendant must reimburse plaintiff, not only for the amount paid for the stock, but for the additional amount paid thereon.

DAMAGES: Measure of Damages—Breach of Contract—Proximate Results. Recovery may always be had for that loss which is the direct result of the breach of a contract.

PRINCIPLE APPLIED: Plaintiff purchased in his own name corporate stock, doing so at defendant's request and on defendant's promise to take said stock and pay plaintiff therefor by a certain time. Defendant breached his contract. Later, the corporation failed. Irregularities were then discovered in the organization of the corporation, such as that the stockholders were rendered liable to the creditors of the corporation for an additional amount on their stock. Held, the additional assessment paid by plaintiff was the direct result of defendant's breach of his contract, and defendant was liable therefor.

Appeal from Wapello District Court.—D. M. ANDERSON,
Judge.

FRIDAY, APRIL 7, 1916.

THIS is an action at law to recover the amount paid by plaintiff for two shares of the capital stock of a corporation, and a stockholder's loss suffered by him, on account of the

purchase's being made for the defendant, at his instance and request, and upon his promise to pay the total cost to plaintiff with interest as plaintiff alleges. Plaintiff claims, also, that it was the agreement between them that he should take this stock in his own name and handle it for defendant until such time as defendant could pay plaintiff and take it off his hands, which time defendant promised would not be later than April 1, 1911. There is a difference between the parties as to the nature and effect of the agreement. The facts are more fully stated in the opinion. A jury was waived, and trial had to the court. The court found for plaintiff for the amount claimed, and rendered judgment against the defendant therefor, and from such judgment the defendant appeals.—*Affirmed.*

Work & Work and *Gilmore & Moon*, for appellant.

J. J. Smith and *E. B. Mitchell*, for appellee.

PRESTON, J.—1. The petition alleges that before, but about, April 20th, 1910, defendant orally requested plaintiff to purchase for him \$200 worth of stock in the Union Iron Works, a corporation, which stock defendant agreed to take from plaintiff not later than April, 1911, and pay the total cost of same, including interest thereon, which oral agreement was, on April 20, 1910, confirmed in a letter written by defendant to plaintiff; that, relying on the oral agreement and the letter, plaintiff did, about April 20, 1910, purchase stock in the Union Iron Works to the amount of \$400, as evidenced by certificates Nos. 31 and 33 for two shares each, at par value of \$100 a share, and plaintiff claims that one of said stock certificates for two shares of stock was purchased for defendant in accordance with the agreement; that the iron works failed, and plaintiff was compelled to pay, on September 9, 1913, the sum of \$28.75 per share, making an additional amount of \$57.50 chargeable to the shares so pur-

1. PRINCIPAL AND
AGENT: the re-
lation: pur-
chasing prop-
erty for an-
other: sales.

chased; that defendant has neglected to take up said stock in accordance with his agreement.

The answer was a general denial, and alleged that, on April 20, 1910, defendant was a director of the Ottumwa Commercial Association, and that, at the request of one Keyhoe, who was the manager of the iron works, he (defendant) undertook to sell some of the unissued capital stock of the iron works; that defendant was not then a stockholder in the iron works, but that he undertook the sale of its stock solely for the purpose of benefiting the iron works, and, incidentally, the city of Ottumwa, by securing additional funds for the iron works which would permit it to increase its business and give employment to more people; that he was informed that plaintiff was already the owner of two shares in said iron works, and that he approached plaintiff to try to induce him to buy some additional stock; that, on the date last mentioned, defendant solicited plaintiff to buy some additional stock, and it was agreed between them that, if plaintiff would purchase and pay for four shares of the stock of the iron works, defendant was willing at that time to pay to the plaintiff the total cost of such two shares to plaintiff, with interest thereon from the time said four shares were purchased by plaintiff until two of the shares were turned over to defendant; that plaintiff did not, on or before April 1, 1911, turn over to defendant, or offer to turn over to him, the two shares of stock, and this has never been done.

It is conceded that plaintiff never did tender the stock to defendant. The letter above referred to is as follows:

“Ottumwa, Iowa, April 20th, 1910.

“Rev. James Foley, City.

“Dear Sir: I write you this letter so that you will understand after my conversation with you that I am willing to take \$200 worth of the stock of the Union Iron Works off your hands not later than April 1st, 1911, and will pay you at that time the total cost of the same to you, including the

interest on the \$200 from the time it is taken until turned over to me. It is understood that I do this voluntarily as you have agreed to handle this additional amount for me until I can take the same. In the mean time the stock to be handled by you in any way you see fit.

“Yours respectfully, Frank A. Nimocks.”

Defendant concedes here that plaintiff's evidence was sufficient to establish the contract as stated in the petition. It is undisputed that the iron works went into bankruptcy in January, 1912, and that certain creditors claimed that the stockholders were personally liable because of irregularities in the organization of the iron works, and that plaintiff gave his check for \$115 to settle the proportion due on the four shares of stock in plaintiff's name. The findings of the trial court upon disputed questions of fact are, of course, of the same force as a finding by a jury; and, in fact, appellant says in argument that he does not intend to base any argument upon any disputed questions of fact, but the argument will be based on undisputed evidence, and especially upon the contract pleaded by plaintiff and the letter before set out; that it is only with reference to the construction of the contract and the rules of law that determine the case that the parties differ.

The same day the letter was written, Mr. Keyhoe, manager of the iron works, called on plaintiff, and plaintiff gave to him a check for \$200, receiving therefor Certificate of Stock No. 31 in the iron works, showing that plaintiff was the owner of two shares, transferable only on the books of the corporation by the holder in person, or by attorney, upon surrender of this certificate properly indorsed. A blank assignment form was printed on the back. On April 29, 1910, he bought two other shares of stock, represented by another certificate, No. 33, in like form as the other. Plaintiff says, and it is undisputed, that he bought these additional two shares on the strength of defendant's having spoken so well of the iron works.

Two or three months after the time for payment to plaintiff from defendant had elapsed, as plaintiff claims, he called defendant by phone and asked him if he was prepared to take up the matter. Defendant, being busy, requested plaintiff to wait a little longer. In two or three months, plaintiff called at defendant's office three or four times, but did not see him, except that, on one occasion, plaintiff saw defendant, and defendant requested that plaintiff let the matter go for a while. In the conversation between them in regard to their contract, defendant never denied his liability, but always requested more time.

Later, and in the fall or winter of 1911, or early in January, 1912, the plaintiff placed the matter in the hands of his attorney for collection. Letters passed between plaintiff's attorney and defendant, and in one of August 10, 1912, defendant said:

"As I said to you before, if Father Foley (plaintiff) bought \$400 worth of stock the last time he bought, and I agreed to take \$200, I would necessarily be bound by that, and I would not try to have Father Foley stand the loss under any consideration, if he took this for me, *as I rather think he did.*"

There is no evidence that plaintiff ever talked with defendant about making a settlement of the claim of creditors against the stockholders of the iron works. Defendant did not own any stock or have any interest in the iron works at any time prior to the purchase of the stock in question.

It is contended by appellant that, if the contract was one by plaintiff to sell and defendant to purchase two shares of stock, then delivery of the certificate by plaintiff and payment of the consideration by defendant were concurrent acts, and neither could be said to be in default until the other had performed or offered to perform his part; that, as plaintiff never offered to perform, he cannot maintain this action, which must be based on the default of the defendant, and further that, time for performance being fixed not later than April 1, 1911, it was of the essence of the contract; and they

say that, delivery being at the option of plaintiff, he was bound to give notice; that plaintiff was bound to make his election by April 1, 1911, and to notify the defendant thereof by that date if he desired to turn the stock over to the defendant, and that plaintiff never made his election and never offered to turn over the stock to the defendant; and they say further that, if the contract be considered an option in favor of plaintiff, then it was never exercised. Authorities are cited to support these different propositions.

The law as thus claimed is not disputed by plaintiff if the contract is to be construed in accordance with defendant's contention. The plaintiff contends, however, that such is not a proper construction of the agreement, but that the contract created the relation between the parties of principal and agent as to the handling of the stock, and that the contract was not one by which plaintiff was to sell and defendant purchase from him two shares of stock; that it was a contract of agency, by which plaintiff held two shares of stock belonging to the defendant, coupled with an interest on account of the purchase price advanced by plaintiff for defendant. It is argued by appellant in support of his contention that the agreement was either an option on the part of the plaintiff to sell the stock to defendant, or a contract on the part of plaintiff to sell and on the part of defendant to buy the two shares of stock, and they say that defendant agreed to take the stock from plaintiff not later than April 1, 1911, and that this last clause means one of two things—that defendant was not bound to take the stock after April 1, 1911, or else that plaintiff could not insist that he (defendant) take the stock before April 1, 1911; and that, if the former be the construction adopted, then defendant is not liable because plaintiff did not make a tender of the stock, and if the latter construction be the one adopted, then plaintiff is not entitled to maintain the action, because he never made a tender of delivery of the stock to defendant. Defendant contends, also, that, if he was not compelled to take the stock before April 1, 1911,—in other

words, if defendant was given credit until April 1, 1911,—then plaintiff could only claim under such a construction that plaintiff had a reasonable time after April 1, 1911, to make a tender of delivery of the stock, and that, because there is no dispute in the evidence, what is a reasonable time becomes a question of law. On the other question, as to whether the contract should be construed as an option on the part of plaintiff to sell the stock to defendant not later than April 1, 1911, that plaintiff cannot maintain this suit because he did not exercise his option until after the time limited; and as to this matter, he says further that, if the contract was such as gave to plaintiff the right to sell the stock to defendant not later than April 1st, the date limited was of the essence, and plaintiff could not exercise his option after that date. The appellant says that he does not rely so much upon the question as to whether the contract is an option as that it was one of sale and purchase of the stock.

But we are inclined to think that defendant's contention is not sound, and that the proper construction of the contract is as claimed by plaintiff. As to whether it was a sale of stock

2. SALES: transfer of title: purchase for another.

or not, we may observe that, at the time the contract was made, plaintiff owned no stock in the corporation and had none to sell, and he was in no manner interested in it. Defendant, who appeared to be interested in the sale of such stock, invited a conference with plaintiff on the subject, and he expressed a desire to acquire a couple of shares and asked plaintiff to assist him, saying that he had no money then, but that he would have money in the course of time, and if plaintiff would advance \$200 for him he would repay it, with interest; and the letter before referred to was thereafter prepared. Plaintiff advanced the money and paid for the stock, as requested by defendant. The two shares of stock in controversy were held by plaintiff as the property of defendant, and plaintiff was ready at any time to transfer the certificate upon payment of the money advanced. The authorities seem to

hold that a contract by which one of the parties agrees to purchase goods for the other at a certain price, and the other agrees to receive them and pay the price on delivery, is a contract of agency for the purchase of goods, not a contract for the sale of the goods. 1 Clark and Skyles on Agency, Sec. 9; *Hatch v. McBrien*, 83 Mich. 159. And further that, where he party making the purchase is acting for the other and not for himself, the contract is one of agency. An agreement by which one of the parties thereto is to purchase land for another, although in his own name, and the other is to pay the purchase price, is a contract of agency. 1 Clark and Skyles on Agency, Sec. 10; *Baker v. Wainwright*, 36 Md. 336.

In the letter before set out, defendant promised to take the stock off plaintiff's hands not later than April 1, 1911, and then pay the purchase money, with interest, and plaintiff was to handle this stock for him until he could take it. We think it quite clear from the evidence that the stock was to be treated and considered as the property of defendant, although taken and held in the name of plaintiff. The letter also provides:

"You have agreed to handle this additional amount for me until I can take the same."

If plaintiff was the owner of the stock, there was no necessity for defendant's giving him any directions as to handling it. Under the letter, plaintiff was given authority under the contract to handle the stock in any way he should see fit, not for himself, but for the defendant.

It should have been stated, perhaps, that, on the several occasions when plaintiff or his attorney endeavored to obtain the fulfillment of the contract, defendant made no claim of failure of plaintiff to perform the contract on his part. It may be that defendant's action and conduct and requests for more time should be considered as admissions of liability.

Appellee further contends that, even if it should be held that the contract was not one of agency, then the transaction should be considered as creating the relation of debtor and

creditor, and that the stock was held by the creditor as security for the payment of the debt. Of course, as between the parties, it is immaterial that the certificate was issued by the corporation in the name of plaintiff. If it was their agreement and understanding that the stock should be purchased for the defendant and handled for him by the plaintiff, then it was, in fact, the property of defendant. We think the error into which defendant has fallen is in the assumption that plaintiff was the owner of this stock, and that the agreement was one providing for a sale by him to defendant. The cases cited by appellant are, as before stated, not in point, because the evidence and a proper construction of the contract and letter do not bear out his contention.

2. As to the item of \$57.50, the liability incurred as stockholder, the settlement for this item was made after plaintiff and his attorney had failed in their efforts to obtain a performance of the contract on defendant's part. Plaintiff was, it is true, the nominal owner of the stock. As between him and the creditors of the corporation, there was no question as to his liability, and this liability was incurred by reason of handling the stock for defendant. The letter authorized plaintiff to handle the stock in any way he saw fit until such time as defendant could take it off plaintiff's hands. Under this contract, it seems to us that defendant should pay the stock liability, as well as the purchase price. If the enterprise had been successful and there had been dividends, they would have gone to the defendant. Taking the entire record together, we think the purpose which the parties had in view when the contract was made was to accommodate the defendant and secure the plaintiff against loss. The stock liability which plaintiff was obliged to settle was, in fact, the defendant's obligation. We have already indicated that the relation was that of principal and agent. A principal is under obligation to reimburse his agent for all advancements and disbursements made by him in good faith for the benefit of the

3. PRINCIPAL AND
AGENT: Rights
of agent: reim-
bursement for
losses, etc.

principal and in the proper execution of the agency, whether there is an express promise by the principal to this effect or not. 1 Clark & Skyles on Agency, Sec. 370.

A principal is also under obligation to indemnify his agent against his losses or damages suffered by reason of any act performed by him in the due execution of the agency; for an agent has a right to assume, in the absence of notice to the contrary, that his principal will not require him to do acts which will render him liable to third persons, and, if the principal does require him to perform such acts, the principal, and not the innocent agent, should suffer the consequences; and in such cases, if there is not an express promise to indemnify it will usually be implied. 1 Clark and Skyles on Agency, Sec. 371.

But, aside from the doctrine of agency, we think defendant should pay this stock liability upon the ground that it was a damage imposed upon plaintiff by reason of this breach of contract. Defendant induced plaintiff to take

4. DAMAGES:
measure of
damages:
breach of con-
tract: prox-
imate results.

and hold the two shares of stock for him upon his promise to take the same off plaintiff's hands not later than April 1, 1911. He breached his contract in this respect and left the stock on plaintiff's hands, with the result of an expense of \$57.50. If he had performed his agreement, the two shares would have been transferred to him, and plaintiff would not have been the nominal holder thereof when the corporation failed, and, therefore, would not have suffered the damage arising from a stockholder's liability.

It is our conclusion, therefore, that the trial court rightly decided the matter, and the judgment is, therefore—*Affirmed*.

EVANS, C. J., DEEMER and WEAVER, JJ., concur.

FORT DODGE LUMBER COMPANY, Appellee, v. L. H. ROGOSCH
et al., Appellants.

ATTORNEY AND CLIENT: Authority of Attorney—Stipulations.

- 1 A stipulation for the settlement of an action, signed by the attorneys for the defendant in the presence of some of the defendants, will be presumed to have been signed by defendant's authority.

ARBITRATION AND AWARD: Agreement to Submit—Construction.

- 2 In a controversy as to the amount due for materials furnished in the construction of a house, an agreement that two named parties shall examine the house and determine the quantity of materials used and make report, and providing that the price of said materials shall be estimated at the market price at time of construction, embraces the power on the part of said arbitrators to fix the price of said materials.

APPEAL AND ERROR: Reserving Question in Lower Court—Ex-

- 3 ceptions to Rule—Jurisdictional Matters. Want of jurisdiction in the lower court may be presented for the first time in the appellate court.

PRINCIPLE APPLIED: Plaintiff brought action to foreclose a mechanic's lien. Before trial, a written stipulation, not amounting to a statutory submission to arbitration, was entered into, providing: "This case is settled and shall be disposed of in the following manner." Two arbitrators were agreed on who were to examine the property and report the amount and price of the materials. Defendants agreed to pay the amount of such report, less credits. *No provision whatever was made for filing said report in court nor for the entry of judgment on the said report.* The arbitrators made their report. The report was filed in the clerk's office. The court proceeded to enter judgment on the stipulation and report. *Held*, the court was wholly without jurisdiction to enter such judgment and such want of jurisdiction might be raised for the first time on appeal.

ARBITRATION AND AWARD: Submission—Common Law Submis-

- 4 sion—Entry of Judgment—Effect. A judgment entered upon an award in a non-statutory arbitration submission, without action thereon, is a nullity.

PRINCIPLE APPLIED: See No. 3.

Appeal from Webster District Court.—R. M. WRIGHT, Judge.

FRIDAY, APRIL 7, 1916.

THIS is an appeal from the ruling of the trial court denying the motion to set aside a stipulation and judgment. The appeal is from such motion. Upon the hearing of the motion, it was overruled, and the defendants appeal.—*Reversed.*

Files & Maher, for appellants.

Burnquist & Joyce, for appellee.

PRESTON, J.—1. The case was started in equity for judgment against defendants and to foreclose a mechanic's lien, but, the appeal being from the order of the court denying the motion, the case is not triable *de novo* here. There was no decree of foreclosure entered, but simply a judgment against defendants. The motion in the lower court raised but three questions, and the grounds thereof, briefly stated, are as follows:

1. That the stipulation of settlement was not authorized by the defendants.
2. That the persons appointed by said stipulation did not follow its directions.
3. That plaintiff had no lien upon the premises.

The third proposition is not argued, and there is but little controversy as to the first. The real point in the case is as to the second, although some other questions are argued as though they had been properly raised in the lower court, or are such that they may be raised here for the first time.

The defendant, Mrs. Rogosch, is the owner of the real estate described in the petition. In 1912, defendants entered into an oral contract with a firm of carpenters, Anderson & Woodbury, by which the carpenters agreed to furnish materials and construct for defendants, according to specifications, a dwelling house on the lots described, for the contract price

of \$1,283; and the residence was constructed. A part of the material for the building was furnished by plaintiff and was purchased by the carpenters. The defendants paid plaintiff \$800 at one time, on behalf of the contractors. On February 4, 1913, plaintiff, as a sub-contractor, filed a statement with the clerk for a mechanic's lien. March 7, 1913, plaintiff filed its petition to foreclose the lien. An answer was filed by defendants, and, on September 11, 1914, when the cause was about to be reached for trial, the attorneys for plaintiff and defendants, and in the presence of one of the defendants, executed the following stipulation:

"This case is settled, and will be disposed of in the following manner, to wit:

"The parties hereto agree that G. Proeschold and Gus Bienz are agreed upon to examine the Rogosch house referred to in plaintiff's petition, and for the construction of which the lumber was furnished by the Fort Dodge Lumber Company, and make a report showing the amount of lumber and plaster of all kinds used in the construction of said house as nearly as the same can at this time be determined, including all necessary and reasonable waste. When said report is made, the price of said lumber and plaster furnished by plaintiff shall be estimated at the market price thereof at the time the house was under construction. The defendants shall pay to the plaintiff any balance remaining unpaid, after allowing credit to defendants for all payments heretofore made on said lumber to plaintiff. If the report shows that there is a balance owing to plaintiff, defendants shall pay the costs of this proceeding, and if the report shows that no balance is owing to plaintiff, then plaintiff shall pay the costs hereof. In the event that it is determined that there is an amount due plaintiff, said sum so due shall draw interest at the rate of six per cent. per annum from the first day of May, 1913." (Signed by the attorneys for the respective parties.)

The attorneys acting for defendants at that time were Mitchell & Fitzpatrick. It seems that the two persons named

as so-called arbiters were named by Mr. Rogosch, the defendant, who was present. The cause then awaited the report of the persons so appointed, who went to the premises to inspect the house. The defendants joined with them, showed them through the house, and showed them the plans and specifications. They told them what materials in the specifications were not furnished by plaintiff, and such items were left out of the report. A report showing the amount due as figured was filed with the clerk, September 17, 1914, and, not being in proper form, a supplemental report, signed by the persons named in the stipulation, was filed on September 19th. Defendants testified that, on that day, as soon as they heard what had been done, they informed Mr. Mitchell, their attorney, that they would not carry out the stipulation, and he told them, in substance, that he would not act for them further, and to get another attorney. The reports give a list of lumber and materials, and recite:

"We have inspected and examined the home owned by defendants, for which lumber and plaster were furnished by the Fort Dodge Lumber Company in the years 1912 and 1913, and have made a list of all lumber and plaster which we found in said building, which said list is hereto attached and made a part hereof, having been heretofore filed in the office of the clerk of the district court. We further certify that we have gone over said list and have accurately estimated the price of said lumber and plaster in said building furnished by plaintiff at the market price thereof in the fall and winter of 1912 and 1913 in Fort Dodge, Iowa, and find that the reasonable price of said lumber and plaster in said house furnished by plaintiff is, and was at said time, in the sum of \$1,450."

Plaintiff's attorneys saw the defendants, but did not take judgment against them until October 7, 1914, which was 18 days after the stipulation was filed, and about that length of time after Mr. Mitchell had told them to procure another attorney.

The substance of the judgment and decree entered finds

and determines that the court has full jurisdiction over the parties and the subject matter of the action, and further:

"The court, proceeding to a hearing on said case, finds and determines that this cause was settled by stipulation entered into by and between all parties hereto."

And a copy of the stipulation is set out in the judgment and decree. The judgment and decree further recites the further proceedings and the report, and that \$800 had been paid upon the account, and further, that there was the sum of \$650, with interest, still due, and judgment was entered therefor.

On October 24, 1914, defendants filed their motion to set aside the stipulation and judgment rendered by the court upon the report, for the reasons heretofore briefly stated. The motion was supported by affidavits, and there was a resistance thereto by plaintiff, and witnesses were called and testified in open court upon the issues raised by the motion.

The assignments of error are:

First. That the so-called arbitrators failed to proceed under the terms of the stipulation.

Second. That the judgment was entered against defendants at a time when they had no attorney.

Third. That the stipulation itself contains no provision for judgment upon the report, and did not provide for the filing of said report in any court, and that, by the terms of the stipulation itself, the case had been settled, and that the original case no longer existed; and further, that the court had no jurisdiction to enter judgment without provision's having been specifically made for such an entry in the stipulation, especially since there was no statutory submission to arbitration.

As before stated, another ground of the motion was that plaintiff had no lien, but this point is not argued. No lien was established by the decree.

On another ground of the motion, that judgment was entered when defendants had no attorney, there is but little,

if any, argument. There is no merit in this last proposition.

1. ATTORNEY AND
CLIENT: au-
thority of at-
torney: stipu-
lations.

The attorney who signed the stipulation for defendant did so in the presence of one of the defendants, and, under the circumstances of the case, we think there is no doubt that there

was authority to enter into the stipulation.

As to the first assignment of error, we think the arbitrators did follow the terms of the stipulation. The point here is that, while the stipulation provides that the price shall be

2. ARBITRATION
AND AWARD:
agreement to
submit: con-
struction.

fixed, it does not specifically provide that it shall be fixed by the two persons appointed.

But the stipulation provides that payment shall be made by one party to the other, whichever way it is found that the balance is due, and this could not be done unless the price was fixed by someone, and there is no provision for the court or anyone else to fix the price. The defendant, Mrs. Rogosch, the owner of the property, made an affidavit in regard to this; but, as a witness on the stand, she said, in regard to her attorney's drawing the stipulation:

"Q. And that Mr. Bienz and Mr. Proeschold were to go to the home, they would go out there and see what the stuff was worth and what material there was in the house? A. Yes, sir. Q. And he said that he was going over to the courthouse and draw up a kind of a paper, didn't he? A. He said that he will draw up a paper to that effect. I was in his office when he said he was going over to the courthouse and draw up some paper to have Mr. Bienz and Mr. Proeschold go out and look over the place, and for them to see how much material there was in the house and how much it was worth; I was willing to let those two men decide that, and I told Mr. Mitchell that at that time."

As said, the arbitrators visited the place and examined it in connection with the plans and specifications. Some of the lumber was concealed under the plaster, and they determined such matters from the plans and specifications, and perhaps with some explanation by the defendants, who were present.

So that it is our conclusion that the fixing of the price was within the contemplation of the parties in drawing the stipulation, and that they had a right to determine that question.

2. The next question in the case is as to the third assignment of error, and whether the court had any jurisdiction to render judgment. This question was not raised in the

3. **APPEAL AND ERROR:** reserving question in lower court: exceptions to rule: jurisdictional matters.

motion to set aside, but it is appellants' contention that, if there was no jurisdiction to enter the judgment upon the report or award, the question may be raised in this court for the first time. This is the troublesome point in the case. This question seems not to be argued by appellee, except that they say that the court had the right to enter judgment upon either the petition or the stipulation. They cite authorities to the point that appellants cannot raise any points upon appeal which were not within the issues in the trial in the court below, and this applies, as we understand it, to some other points which have been argued by appellants and which were not raised in the court below. Their contention is that the effect of the stipulation was to work a dismissal of the pending action, and their claim is that the remedy is by an independent action upon the report or award. To the point that the stipulation works a dismissal, they cite *Goodwin v. Merchants' & Bankers' Mut. Ins. Co.*, 118 Iowa 601.

Appellants contend that the stipulation effected, at most, a common law rather than a statutory submission to arbitration, citing *Fink v. Fink*, 8 Iowa 313, *Love v. Burns*, 35 Iowa 150, *Foust v. Hastings*, 66 Iowa 522, *Wilkinson v. Prichard*, 145 Iowa 65. They say also that, there being no statutory submission, the lower court was without authority or jurisdiction to adopt the award and enter judgment thereon. *Burroughs v. David*, 7 Iowa 154, 159; *Skrable v. Pryne*, 93 Iowa 691; *Thornton v. McCormick*, 75 Iowa 285, and cases before cited.

No authorities are cited by appellee on the point as to

whether the question of jurisdiction may, under the circumstances, be now raised, and no authorities are cited by appellant other than those already referred to. But the authorities seem to be all one way—that the Supreme Court will recognize a want of jurisdiction, even if no objection of that kind be made, and the court may raise the question itself. Without a discussion of the cases, the following, among others, may be cited: *State v. Van Beek*, 87 Iowa 569; *Cerro Gordo County v. Wright County*, 59 Iowa 485; *Walters v. Steamboat*, 24 Iowa 192; *Groves v. Richmond*, 53 Iowa 570; *St. Joseph Mfg. Co. v. Harrington*, 53 Iowa 380; *District Township v. District Township*, 45 Iowa 104.

The jurisdiction of the district court itself may, of course, be questioned in the Supreme Court. It is quite clear that the stipulation is not a submission to a statutory arbitration. It provides that the case is settled. It is true

4. ARBITRATION
AND AWARD:
submission:
common law
submission:
entry of judgment:
effect.

that this does not mean under other provisions that it has been settled in the sense that the indebtedness has been paid, but that it is settled so far as the action is concerned.

Furthermore, the stipulation nowhere provides that a judgment may be entered upon the finding of the arbitrators, and we think the court had no authority to render a judgment thereon. There is no pretense that the court acted on anything else than the award of the arbitrators, except to deduct the \$800 payment which the pleadings admitted had been made.

It is argued by appellee that this motion to set aside was only to set aside the stipulation, but we think the motion is broader than that. We have given the language used. It is true, however, that the grounds set out in the motion have reference more particularly to the stipulation, but the motion itself asked that the stipulation and the judgment be set aside.

For the reasons given, we are of opinion that none of the grounds urged in the motion for setting aside the stipulation are well taken, but that the district court had no jurisdiction

or authority to enter judgment, and that, though the question was not squarely raised by appellant in the district court, the point may be presented here.

The judgment is, therefore, *Reversed*, with directions to the district court to set aside the judgment.

EVANS, C. J., DEEMER and WEAVER, JJ., concur.

ADA JANE GRAFTON, Administratrix, Appellee, v. FREDERICK A. DELANO et al., Appellants.

RAILROADS: Accident at Crossing—No Eyewitnesses—Contributory

- 1 **Negligence.** The presumption indulged in the absence of eyewitnesses is substantive evidence upon which the jury may find want of contributory negligence; at least, the existence of such presumption is quite influential in depriving the court of the right to pass upon such question.

PRINCIPLE APPLIED: A railway, as it entered the town from the east, curved to the north. Stock pens just to the east, and a slaughterhouse just to the west, of the railway, were situated 1,500 feet north of the depot. A lane led north from the slaughterhouse 300 feet, to a much used and recognized semi-public crossing. South of this crossing and north of the depot was a public crossing. Deceased, who was employed in connection with the slaughterhouse, and familiar with the surroundings, was returning from the slaughterhouse, with a boy 13 years old, and both were killed on the lane crossing, by a train which did not stop at the depot and which was running 45 miles an hour, and was 1½ hours late. The day was cold—about zero; snow covered the ground, and the wind was from the northeast. Owing to the curve in the track, and to intervening objects, the approach of a train from the east was obscured from one in the vicinity of the crossing. It was in dispute whether a train, after passing the depot, would be in clear view from the crossing. The presence of deceased was not seen by the fireman nor by the engineer until instantly before the collision. No living witness saw deceased as he approached and went upon the crossing. The negligence alleged was (1) failure to give warning signals, (2) excessive speed and (3) failure to maintain proper lookout, as to all of which there was evidence tending to so show. *Held*, the presumption that deceased was in the exercise of due care justified a finding accordingly.

RAILROADS: Accident at Crossing—Non-Stopping of Train—Care
2 Required. The conceded right to operate trains through a city or town without stopping must be exercised with due regard to those rightfully on or about crossings, even though the crossings are not strictly public. Evidence reviewed, and *held* to justify a finding of negligence.

PRINCIPLE APPLIED: See No. 1.

APPEAL AND ERROR: Review—Verdict—Sufficiency of Support.
3 In determining whether a verdict has sufficient support in the evidence, the appellate court is bound to give the testimony bearing on any particular issue the most favorable construction of which it is fairly susceptible in support of the verdict.

TRIAL: Instructions—Requisites and Sufficiency—Quasi Public
4 Crossing. An instruction that a certain quasi public railway crossing was "in the nature of a private crossing" was sufficiently accurate and wholly non-misleading.

APPEAL AND ERROR: Evidence—Exclusion—Immaterial Matter.
5 Error cannot be predicated on the exclusion of evidence which either (a) calls for matters of general and universal knowledge or (b) is wholly immaterial.

APPEAL AND ERROR: Scope of Review—Questions Failing to
6 Disclose Proposed Evidence. When the form of a question does not disclose (a) what the answer would have been or (b) whether its exclusion was prejudicial, counsel must disclose to the court what fact he desires or expects to prove by the witness, in order to render the objection to its exclusion reviewable.

PRINCIPLE APPLIED: Deceased was killed, beyond the station, by a fast train which passed without stop, through a town, one of the complaints being failure to keep proper lookout for persons on or near crossings. The fireman testified that, after passing the station, he first looked up the track and saw no one on the right of way, and then turned his attention to coaling the engine. The question excluded and held non-reviewable was, "What is your ordinary duty after you pass a public highway or other opening?"

DEEMER, J., dissents as to the application of the rule.

APPEAL AND ERROR: Right of Review—Failure of Court to Rule
7 on Motion. No ruling by the court, no reviewable matter. So *held* on a motion to strike the answer of a witness.

EVIDENCE: Documentary Evidence—Expectancy of Life—Standard
8 Life Tables. Standard life tables are competent to show the expectancy of life.

TRIAL: Verdict—Excessiveness—\$9,024. Verdict of \$9,024 for death
9 sustained. Deceased was 53 years of age, his expectancy was some
16 years, was earning \$1,000 a year, was industrious and saving,
had accumulated a home and six town lots, several cows, a team
and some pigs and poultry, all of which animals were a source of
profit to him.

APPEAL AND ERROR: Right of Review—Record Not Showing
10 **Proceeding—Objectionable Argument.** Matters against which
objections are leveled *must* be made a part of the record. Improper
argument cannot be made of record by counsel's inserting in his
objection what he claims opposing counsel said.

Appeal from Page District Court.—E. B. WOODRUFF, Judge.

FRIDAY, NOVEMBER 26, 1915.

REHEARING DENIED FRIDAY, APRIL 7, 1916.

ACTION at law to recover damages on account of the death
of Andrew P. Johnson. Verdict and judgment for plaintiff,
and defendants appeal.

J. L. Minnis, N. S. Brown, and Jennings & Mattox, for
appellants.

Earl R. Ferguson and C. R. Barnes, for appellee.

WEAVER, J.—The accident in question occurred near the
defendant's railway station at the incorporated town of
Blanchard, in Page County. While the general course of the
railway is east and west, its track curves, as it enters the town
from the east, and runs thence substantially due north for a
considerable distance. Some 1,500 feet or more north of the
station is a stockyard or stock pen, adjacent to the track on the
east side. On the opposite side and near the right of way is a
slaughterhouse and stock pen. From this house running north
about 300 feet, where it turns at a right angle eastward and
thence across the tracks, is a lane or road, affording communi-
cation between the public street on the east side of the right
of way and the slaughterhouse and stockyards. It is graded

up to afford approach to the crossing for teams and vehicles, and the crossings of both main and side tracks are planked for that evident purpose. Across the entrance to this lane on the west side of the track is a gate, but the evidence is sufficient to justify the finding that it was usually left open. The crossing has been maintained in this manner for 10 years or more, and there is evidence to the effect that it was in quite constant use, especially by those having occasion to visit the stockyards and slaughterhouse. The intestate, Johnson, was employed as a butcher and teamster, and in the course of his duties made frequent trips through the lane and over the crossing and was familiar with the surroundings. On January 12, 1912, accompanied by Ralph Johnston, 13 years of age, a son of his employer, he had driven to the slaughterhouse, and on the return trip, both man and boy were struck and killed on the crossing, by the defendant's train moving north. The train in question is known in the record as No. 1, and was due at Blanchard at 7:46 A. M. On this occasion, it was an hour and a half late and moving at a high rate of speed—probably not less than 45 miles an hour. The weather was cold—the mercury standing at or near zero. Snow had fallen to a depth of several inches, and there was some wind from the northeast. Owing to the curve east of the station and intervening obstacles, the approach of a train from that direction would be obscured from a person in the vicinity of the stockyards crossing. Upon the question whether a train after passing the station would, under all the circumstances shown, be in clear view from this crossing, the testimony is not so explicit or undisputed as to render its disposition a matter of law. The appellants' theory is that there must have been a view of the approaching train had the deceased looked after passing the line of telegraph poles about 25 feet from the track. The fireman upon the engine, whose place was upon the west side of the cab, saw nothing of the deceased or the boy until after the collision. The engineer, sitting on the east side, saw nothing except at the very instant of the collision,

when he caught a glimpse of the horses only about four feet ahead of the engine, according to his estimate, and at once sought to stop, but ran on about 1,500 feet before bringing his train to a standstill. No living witness appears to have seen how deceased approached or entered upon the crossing or what precaution he took, if any, against being run down by a passing train. The plaintiff charges the defendant with negligence in failing to sound any signal of the approach of the train to the Blanchard station; in sounding no signal or alarm of its approach to the street crossing between the station and the lane crossing where the deceased was killed; and in operating the train at a rate of speed which, under the surrounding circumstances, was excessive and dangerous, and without any care to look out for the safety of persons who might lawfully be upon the crossing. Defendant denies all charges of negligence, and avers that deceased contributed to his own death by his own want of care. The issues of fact were found against the defendant by the jury, and we have to consider whether any reversible error was committed by the trial court with reference to the matters argued and submitted upon this appeal.

I. It is the contention of the appellant that deceased was chargeable with contributory negligence as a matter of law. The exception cannot be sustained. The foregoing statement of facts finds fair support in the testimony offered in plaintiff's behalf, and we think it very manifest therefrom that the circumstances were amply sufficient to carry to the jury the question whether the deceased was in the exercise of due care. Indeed, the conceded fact that no living witness saw him as he approached the track, or is able to say what precaution he took, if any, or what, if anything, he omitted to do which he ought to have done, of itself brings into effect the presumption that he did what the average reasonable and prudent person would ordinarily do under the circumstances by which he was surrounded. See

1. RAILROADS: accident at crossing: no eyewitnesses: contributory negligence.

Dalton v. Chicago, R. I. & P. R. Co., 104 Iowa 26, and the numerous cases in which that precedent has been followed. Nor can we argue that the effect of this presumption is rebutted as a matter of law by the other circumstances shown in the record. Even if the deceased, as he turned to the crossing, saw or heard the train as it approached the station a third of a mile away, we cannot say that, as an ordinarily prudent man, he was bound to anticipate that it would, without stopping or moderating its speed, plunge through the yards and over the crossings, rightfully open to the use of the public, in a manner to render hazardous his attempting to cross the track at that time. Indeed, so far as shown, he may have attempted to stop in a place of safety and found himself unable to control his team in the stinging cold of the morning and the excitement occasioned by the sudden approach of the train. True, there is no evidence that this did occur, nor is there any evidence that it did not, but the presumption to which we have referred was sufficient to justify the jury in the inference that he did all that a prudent man could reasonably be expected to do to avoid exposure to sudden and violent death from the train which bore down upon him.

Upon the further question whether there is evidence to support the charge of negligence made against the company, we are satisfied that plaintiff made a case for the jury. While doubt-

less the company was within its legal rights in passing through the town without stopping at the station or at the crossings, it was nevertheless bound to exercise that right with

reasonable regard for the safety of the people lawfully using the ways leading across its tracks. There is evidence, as we have before noted, that the train approached and swept through the town and the railroad yard where the accident occurred at a very high rate of speed, and without the usual or other adequate warnings of its approach. That persons rightfully traveling upon the streets and ways might be upon

2. RAILROADS: accident at crossing: non-stopping of train: care required.

or approaching the crossings must have been, or at least ought to have been, anticipated by those in charge of the train; but so far as the record shows, it seems to have been disregarded. The fact, too, that neither the fireman nor the engineer discovered the deceased or his team until the very instant of the collision has some tendency to show that they were not maintaining any efficient lookout.

For the purposes of the appeal, this court is bound to give the testimony upon these issues the most favorable construction of which it is fairly susceptible in support of the

3. APPEAL AND
ERROR: review:
verdict: suffi-
ciency of sup-
port.

verdict of the jury, and when this is done, there can be no reasonable doubt that the trial court did not err in refusing to set aside the verdict.

II. The seventh instruction to the jury was to the effect that the burden was upon the plaintiff to prove the alleged negligence of the defendant, and in that connection told the jury that it was conceded that the crossing

4. TRIAL: Instruc-
tions: requis-
ites and suffi-
ciency: quasi
public crossing.

where the collision took place was not a public crossing, and that the statute requiring the giving of signals at public crossings did not apply thereto; and in so instructing the jury, the court added:

"The crossing where the accident occurred was in the nature of a private crossing. A railway company is not required to use the same care towards persons using private crossings as it is toward those who are using public ones."

The only criticism made of this language is based upon the use of the words, "in the nature of," when, counsel say, the court should have told the jury unequivocally that it was in fact a private crossing. It is indeed difficult to imagine how the form of expression employed by the court could have prejudiced the defense. The crossing was not a public one in the sense that it was a recognized or legally established highway; and on the other hand, it was something more than a private one, as that phrase is commonly used with reference to crossings furnished by a railway to connect the parts of a farm severed

by a railroad. The charge could not conceivably have misled or confused the jury, and the principle of law stated by the court was distinctly favorable to the defendants, if not more favorable than they were entitled to. The assignment of error thereon is overruled.

III. Other assigned errors which have been argued by counsel relate wholly to rulings on questions of evidence, and are as follows: The fireman having testified that, after passing the station at Blanchard, he turned

5. **APPEAL AND ERROR:** evidence: exclusion: immaterial matter.

his attention to the work of coaling the engine, but before doing so, he looked up the track and satisfied himself that there was nothing on the right of way, counsel for appellant asked, "What do you say as to that being your duty?" and answer thereto was excluded upon plaintiff's objection. The correctness of the ruling is too clear for argument. If the question had reference to the witness's act in coaling his engine, it was a matter of common knowledge, as well known to the jury as to the witness, that the firing of his engine is the duty of a fireman. If it related to his act in looking forward, then it was not material; for he testified that he did look before coaling the engine. If any other fact was in the mind of counsel, it was not revealed to the court, and the exclusion of the answer was therefore not erroneous.

This ruling was immediately followed by the inquiry, "What is your ordinary duty after you pass a public highway or other opening?" and upon objection's being sustained,

6. **APPEAL AND ERROR:** scope of review: questions failing to disclose proposed evidence.

it was repeated quite persistently, with a little variation in form, and the answer was excluded. It is enough to say in this connection that counsel did not disclose to the court what fact he desired or expected to prove by the witness, and this court cannot say, from the form of the question, what the answer would have been, or whether its exclusion was prejudicial.

Several objections were made and exceptions taken to

inquiries to witnesses as to what they had observed of deceased in his manner of using the crossing. Counsel concede the propriety ordinarily of this kind of testimony as tending to strengthen the presumption of due care on part of deceased where there is no eyewitness of his conduct at the time; but say that in this case it should have been excluded, because the proved physical facts show conclusively that he could not have exercised reasonable care. This objection is fully covered by what we have said in the preceding paragraph, and it need not be repeated here. The case made by the plaintiff was, as we have seen, sufficient to entitle her to go to the jury.

In another instance complained of by appellants, they moved to strike an answer which they deemed objectionable, but the record shows no ruling thereon. As there was no ruling, there was, of course, no error. Had defendants desired a sufficient record thereon, they should have called the omission to the attention of the court and obtained a ruling, or at least a record of a distinct refusal to rule.

7. **APPEAL AND ERROR:** right of review: failure of court to rule on motion.

The court permitted the plaintiff to introduce in evidence the standard life tables to show the expectancy of life of her intestate, and to this exception was taken—not to the method of the proof, but to the competency of the fact. The competency in such cases of evidence of this nature has been too long and too universally approved to be open to argument or to make it proper for us to extend this opinion for the citation or review of the precedents. But counsel say that the evidence as offered had the effect to impress the jurors with the thought that the proof was admitted to show that the earning capacity of the deceased would have continued unabated to the full end of his expectancy. Nothing of that kind is suggested in the record, and we cannot presume that any such unreasonable theory was indulged in by the jury.

8. **EVIDENCE:** documentary evidence: expectancy of life: standard life tables.

It is finally argued that the verdict is excessive. The

damages assessed were \$9,024. The deceased was 53 years old, and his expectancy of life was between 16 and 17 years.

9. TRIAL: verdict: He was earning about \$1,000 a year, and
excessiveness: appears to have been industrious and frugal.
\$9,024.

He had acquired a home and six town lots, the value of which is not shown. He owned a team, several cows, pigs and poultry, which were a source of profit to him. The estimate of damages or the value of a man's life to his estate is left largely to the discretion of the jury. The court can give to the jury no rule by which such sum can be determined to a mathematical certainty, and, if the award be not so great as to make it clear that the verdict is the result of passion or prejudice or of a palpable disregard of the evidence or of the law as given in the instructions, it is not within the proper province of the court to interfere with it. The record before us does not present such a case.

Finally we are asked to reverse the judgment because of alleged misconduct of plaintiff's counsel in argument to the jury. It is said that counsel improperly worked upon the

10. APPEAL AND ERROR: right of review: record not showing proceeding: objectionable argument.
sympathy of the jury by comparing the value of human life with that of fancy bulldogs, fine horses and valuable hogs, for injury to which, when shipped as freight, the defendant would be liable. Whether this kind of argu-

ment would justify the setting aside of a verdict, or would justify this court in holding that the trial court erred in refusing to set it aside on such ground, we need not here decide; for we find no proper record that plaintiff's counsel did so offend. The abstract shows the following, and nothing more:

"Mr. Ferguson closed for the plaintiff. In his closing argument, the court being absent from the room, defendants asked for return of the court and reporter, and made the following objections to remarks of counsel in closing argument."

Following these words, defendants' counsel undertook to repeat as part of his objection certain language which he said

was used by Mr. Ferguson in addressing the jury. The objection being made, the court remarked, "The court will give the jury the law of the case instead of Mr. Ferguson." The argument objected to does not appear to have been taken down by the reporter when delivered, and there appears to have been no attempt to make it part of the record. That end is not to be attained by the mere declaration of opposing counsel in the course of stating an objection to the court.

Most of the other assignments of error have not been argued, and, so far as the remaining points made have been mentioned in argument, but not referred to in the opinion, we think that they are without merit.

We find no sufficient ground for setting aside the judgment below, and it is—*Affirmed*.

EVANS, C. J., and PRESTON, J., concur.

DEEMER, J. (specially concurring).—I think that the question propounded to the fireman, treated by the majority in the third division of the opinion, should be considered on its merits, and not put aside because we cannot say what the answer of the witness would have been. Surely counsel should not be permitted to ask a leading question suggesting to both the court and witness what the answer would be, and, if it sufficiently appears what the purpose of the question was, this should be held sufficient. It is perfectly manifest from the questions put to the witness that the defendants were trying to prove by this witness that the fireman on the engine, after passing the depot or station in Blanchard and after looking up the track, proceeded to coal the engine and to otherwise attend to it, thereby leaving his station when he should have been on the lookout for people on the track, and that in so doing he was simply doing his duty to his employer, and therefore was not negligent in temporarily leaving his seat. He was asked, "What do you say as to that being your duty?" and "What is your ordinary duty after you pass a public highway or other opening?" To my mind it is apparent what the purpose of these questions was and just as clear that the

answer was to be in justification of his conduct in leaving his station to coal and attend to his engine; quite as clear as if counsel had stated what he expected to prove by the witness. Counsel could not have done more than say: "This witness has testified that, after passing the station of Blanchard and looking up the track, he turned his attention to coaling and caring for his engine; now we want to prove that this was his duty and that what he did was in the proper performance of his duty to his employer." This would amount to nothing more than what the record already disclosed. Counsel for appellee make no such points, which are considered by the majority insufficient to justify a review of the rulings in question, doubtless for the reason that they thought that there was no merit in them. I think that all the propositions referred to by me in this concurrence should be squarely met; that they are in the record for decision, and that the manner of their treatment induces confusion into our practice which should be avoided. I am of the opinion, however, that plaintiff made out a case for a jury and that the rulings on testimony were correct; the latter for the reason that, no matter what the fireman's duty to his employer, he also owed a duty to persons who might be at or near public or private crossings, and that it was for the jury to say which was primary; and that in any event, having testified as to what he was doing after leaving the station and looking up the track, it was for the jury to say whether he was negligent in stepping aside to coal his engine. I register this concurrence so as not to be bound by the other propositions laid down by the majority.

IN RE ESTATE OF CHARLES CHISMORE, DECEASED.

CLARISSA A. CHISMORE BIDER, Appellant, v. ANNA CHISMORE,
Appellee.

BILLS AND NOTES: Consideration—Sufficiency of Proof—Action Against Estate. Consideration for a negotiable promissory note is sufficiently established, in an action against the estate of a deceased, by introducing the note, following proof of its genuineness. (Sec. 3069, Code, 1897, and Sec. 3060-a24, Code Supp., 1913.)

Appeal from Linn District Court.—F. O. ELLISON, Judge.

FRIDAY, APRIL 7, 1916.

THE facts are fully stated in the opinion on the former appeal, reported in 166 Iowa 217. Upon remand, the promissory note and evidence tending to prove the genuineness of the decedent's signature were introduced; and thereupon, verdict, on motion of the administratrix, directed for defendant. From judgment entered thereon, claimant appeals.—*Reversed.*

E. J. Dahms and *F. L. Anderson*, for appellant.

C. E. Wheeler, *E. C. Preston* and *O. N. Elliott*, for appellee.

LADD, J.—The claim was for the amount owed on a promissory note, alleged to have been executed by deceased to claimant, from whom he had been divorced. The administratrix of the estate of the deceased pleaded, in addition to the denials interposed by the statutes, want of consideration. On the first trial, a verdict was directed for plaintiff, but subsequently set aside, and a new trial granted. An appeal was taken from this order, but the ruling was approved (166

BILLS AND NOTES: consideration: sufficiency of proof: action against estate.

Iowa 217). The court was said to have erred in holding that (1) whether the signature to the note was genuine and (2) whether there was a consideration therefor, were issues for the jury. The first of these questions was fully considered, and on the last trial, the only evidence adduced was the note and testimony tending to prove the genuineness of the signature. Thereupon, the administratrix moved that the jury be directed to return a verdict in her favor, for that the consideration of the note had not been proved. The motion was sustained, on the theory that the former opinion ruled that this was essential to recovery. If so, then this was rightly regarded as the law of the case, in so far as these parties are concerned. *Burlington, C. R. & N. R. Co. v. Dey*, 89 Iowa 13, 24; *Hendershott v. Western U. Tel. Co.*, 114 Iowa 415; *Vogt v. Grinnell*, 133 Iowa 363.

The law is equally well settled, however, that every contract in writing, signed by the party to be bound, imports a consideration. Section 3069, Code, 1897. This is especially true of the ordinary promissory note, for Section 3060-a24, Code Supp., 1913, declares that:

"Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value."

Because of this presumption, the burden of proof is on the defendant so asserting to prove want of consideration. *Board of Trustees v. Noyes*, 165 Iowa 601; *Luke v. Koenen*, 120 Iowa 103, 105; *Schulte v. Coulthurst*, 94 Iowa 418, 421. The only references to the matter of consideration to be found in the former opinion, aside from mention of the errors assigned, are these:

"To recover, the plaintiff must establish two propositions: (1) That the note, upon which she predicates her right to recover, was executed by intestate; (2) that it rests upon a good or valuable consideration."

How is this last to be accomplished? By introducing the note duly signed by defendant's decedent, and this is pointed out by the opinion in saying that:

"Every negotiable instrument is deemed, *prima facie*, to have been issued for a valuable consideration and every person whose signature appears thereon to have become a party thereto for value" (citing Code Supp., 1913, Sec. 3060-a24).

Whether the note was introduced in evidence on the former trial does not appear from the opinion, but it is very clear therefrom that the note, when identified by proof of decedent's signature, was held to be *prima-facie* evidence that it was given for value. And this is not obviated by what is said later on:

"In this case, the plaintiff's right to recover rests upon due proof of the execution of the instrument upon which she relies and that it rests upon a good or sufficient consideration" (citing *Schulte v. Coulthurst*, 94 Iowa 418).

If there were any doubt, it was resolved in favor of the sufficiency of the note alone as proof of consideration by the case cited; for there the court, speaking through Kinne, J., said:

"The introduction of the note, in the absence of evidence offered by the defendant, would make a *prima-facie* case entitling the holder to recover. . . . The note then imported a consideration. . . . The presumption obtained, until overcome, that the amount appearing from the note itself to be due from the decedent was in fact due. . . . After the note was in evidence there attached to it a presumption that it was unpaid, and that the amount appearing on its face to be due was in fact due from decedent. . . . The note itself, when in evidence, after its genuineness had been shown, raised the presumption that the amount represented by it was due, and such presumption obtained until overcome. In other words, it matters not how the fact as to what is due is

shown, whether by testimony as to the fact or by presumption raised by law.”

Evidently the trial court, in interpreting the opinion, confused what it is said must be established with the proof essential to do so. Conceding, without deciding, that consideration must have been proved to warrant recovery, this was done by the introduction of the note in evidence, in connection with the testimony showing the signature to have been genuine. Therefrom the presumption arose that it was given for value, and rested on a sufficient consideration. The court erred in directing the jury to return a verdict for the administratrix.—*Reversed.*

EVANS, C. J., GAYNOR and SALINGER, JJ., concur.

A. L. JOHNSTON, Appellee, v. FREDERICK A. DELANO et al.,
Receivers, Appellants.

NEGLIGENCE: Contributory Negligence—Children—No Eyewit-

1 **ness—Presumptions.** An action for damages for negligently causing the death of a 13-year-old boy, with no eyewitness as to the manner in which he was conducting himself as he approached and went upon the point of danger, is aided by two presumptions, both rebuttable by the defendant, and both furnishing substantive evidence on the question of due care, viz.:

1. That a child under the age of 14 years has not negligently contributed to his own injury.
2. That he exercised reasonable care for his own safety.

NEGLIGENCE: Imputed Negligence—Children—Reliance on Adult.

2 The negligence of a man of mature years is not imputable to a 13-year-old boy riding with him. He has a right to reasonably rely on the driver's superior age, etc., without being chargeable with contributory negligence *per se*, and a jury (there being no eyewitness of the accident and the attending circumstances) may very properly find that he did so rely, even though there is no evidence of such fact.

NEGLIGENCE: Contributory Negligence—Children—Negligence per

3 **se.** Evidence reviewed, and held not to charge the deceased, a young, 13-year-old boy, with contributory negligence as a matter of law.

NEGLIGENCE: No Eyewitness Rule—Rule Reaffirmed. The “no
4 eyewitness” rule, as heretofore applied in this court, is reaffirmed.

RAILROADS: Accident at Crossing—Negligence—Sufficiency of Evi-
5 **dence.** Evidence reviewed, and held to clearly present a question
for the jury as to defendants’ negligence in running their train at
a high rate of speed and without proper lookout, over a semi-public
crossing.

RAILROADS: Accident at Crossings—Semi-Public Crossing—Duty.
6 While it may not be incumbent upon a railroad company to give
the statutory signal warnings at a semi-public crossing, yet its
duty is ever present to exercise at such crossings a degree of care
proportionate to the known, or reasonably to be apprehended, peril
to be avoided.

RAILROADS: Accident at Crossing—Statutory Signals—Semi-Public
7 **Crossing.** The failure to give the statutory warning signals at a
place required by law—for instance, at a public crossing—may be
the proximate cause of a collision at a near-by place where by law
such signals are not required—for instance, at a semi-public cross-
ing.

RAILROADS: Accident at Crossing—Lookout—Failure to Keep—
8 **Negligence.** Evidence reviewed, and held to justify a finding of
negligence on the part of a train crew in not keeping a proper out-
look for persons on or about a semi-public crossing.

EVIDENCE: Opinion Evidence—Conclusions—Non-Expert Matters.
9 Conclusion questions on non-expert matters are not allowable—for
instance, whether a certain railroad crossing was a *public* or a
private crossing.

DEATH: Damages—Evidence—Occupation of Parent of Deceased
10 **Child.** The nature and emoluments of the occupation of the
father of a deceased child become material and competent in an
action for the wrongful death of the child, especially when the
child’s substantial participation in the father’s business is shown.

TRIAL: Instructions—Requisites and Sufficiency—Test of Prepon-
11 **derance of Testimony.** It is not prejudicial error for the court to
state in an instruction that the test of “preponderance and weight
of the testimony is where you believe the truth to be after hearing
all the evidence.”

APPEAL AND ERROR: Assignment of Error—Omnibus Assignment.
12 A general, sweeping assignment that the court erred in failing to
submit to the jury five special interrogatories, presents no ques-
tion for consideration.

TRIAL: Special Interrogatories—Attempt to Cross-Examine Jury.

13 Special interrogatories which partake more of the nature of a cross-examination of the jury than a submission of ultimate questions of fact are properly refused.

APPEAL AND ERROR: Exceptions—Necessity for Record.

14 An exception without a record upon which to base it presents nothing. So held where appellants claimed that the court allowed counsel but 15 minutes in which to prepare objections to proposed instructions.

APPEAL AND ERROR: Harmless Error—Criticism of Counsel by

15 Court. The court's criticism of counsel's conduct, though counsel is acting in good faith, must be regarded as harmless, when no reference is made to counsel's client or to the merits of the controversy.

Appeal from Shenandoah Superior Court.—GEORGE H. CASTLE, Judge.

FRIDAY, NOVEMBER 26, 1915.

REHEARING DENIED FRIDAY, APRIL 7, 1916.

ACTION at law to recover damages to plaintiff on account of the death of his minor son. There was a verdict and judgment for plaintiff, and defendants appeal.—*Affirmed.*

N. S. Brown, and Jennings & Mattox, for appellants.

Earl R. Ferguson and C. R. Barnes, for appellee.

WEAVER, J.—The accident in which plaintiff's son lost his life is the same which we had to consider in the case of *Grafton, Admr., v. Delano*, 175 Iowa —. We shall, therefore, not here repeat the history there recorded, save so far as may be required for the purpose of clearness.

Plaintiff conducted a meat market in the town of Blanchard, in Page County, Iowa. He had in his employ one Andrew Johnson. His son, Ralph, a boy of about 13 years of age, was also employed to some extent about the business and the home. On a morning in January, 1912, the employee, Andrew, accom-

panied by the boy, drove a team and wagon to the slaughterhouse, a short distance north of town. It was necessary to such errand that they cross the track of the Wabash Railroad Company, and this they did by driving north on one of the streets of the town near and parallel to the line of the railroad, to a lane or way hereinafter more particularly described. Turning west at the lane, they followed it across the tracks to the slaughterhouse, and soon thereafter began their return trip over the same route. While crossing the track, they were struck by one of defendant's trains, Andrew being instantly killed, and the boy dying within a few minutes of the injuries so received. This action was later brought against the defendant for damages, on the theory that the death of the lad was caused by negligence of the defendants in operating the train.

As in the former case, the particular negligence specified is that the defendants failed to sound the statutory alarm as the train approached the street crossing just south of the lane where the collision occurred, and that the train was being operated at an excessively high rate of speed through the station grounds and yard, without proper care to watch for or protect the lives of those who might lawfully be using said lane. The defendants having taken issue upon the allegations of the petition, there was a jury trial and verdict and judgment for the plaintiff.

I. Appellants argue that there is no evidence of the exercise of due care by the deceased for his own safety and that he should be charged with contributory negligence as a matter of law. The proposition that there is no

1. NEGLIGENCE:
contributory
negligence:
children: no
eye-witness:
presumptions.

evidence of due care by the deceased is not sustained by the record. It is in evidence without dispute that the boy was a little less than 13 years old, and there is, moreover, no living witness who is able to testify as to what he did or failed to do by way of precaution against the fatal collision. Under the established rules of law prevailing in this state, there is a presumed incapacity for contributory negligence in a child

under the age of 14, and, to defeat a recovery for his negligent injury, such presumption must be overcome by proof that he did not exercise the care and discretion usual or to be expected in children of a similar age. *Doggett v. Chicago, B. & Q. R. Co.*, 134 Iowa 690; *Hazelrigg v. Dobbins*, 145 Iowa 495, 500; *Long v. Ottumwa R. & L. Co.*, 162 Iowa 11.

Where also, as in this case, there is no living witness who saw or knew what the deceased did or omitted to do by way of care or caution in entering upon the crossing, the law presumes that he exercised reasonable care for his own safety, and if reasonable care required him to stop or look or listen; it is presumed that he did so. *Dalton, Admr., v. Chicago, R. I. & P. R. Co.*, 104 Iowa 26; *Lunde, Admr., v. Cudahy*, 139 Iowa 695; *Gray, Admr., v. Chicago, R. I. & P. R. Co.*, 143 Iowa 278; *Brown, Admr., v. West Riverside Coal Co.*, 143 Iowa 662, 673; *Stephenson, Admr., v. Sheffield Brick & Tile Co.*, 151 Iowa 371, 376; *Korab v. Chicago, R. I. & P. R. Co.*, 149 Iowa 711, 717.

It follows that, with the facts from which these presumptions arise being conceded in this case, it cannot be said that there is no evidence tending to support the allegation that deceased was in the exercise of due care. It is true that neither presumption is conclusive, and both may be rebutted by proof of facts or circumstances from which it can properly be inferred that, though a child of less than 13 years, deceased did not use the care or caution for his own safety which may reasonably be expected from one of his age, capacity and experience. But the effect of such rebuttal is rarely so apparent or so convincing as to make the question one of law, and is to be passed upon by the jury. As said by us in the *Brown* case, *supra*:

"Such proof can rarely, if ever, be made so clear and unmistakable as to enable the court to dispose of the issue thus presented as a matter of law."

This case is no exception to the rule stated. Even if it should be said that Andrew, who was driving the team, was

negligent, such negligence is not imputable to the boy, and constitutes no defense to the claim here sued upon.

It is unnecessary to consider whether, if the deceased had been of mature years, he would be justified in letting his confidence in the driver influence his own activity in looking

2. NEGLIGENCE:
imputed negli-
gence: chil-
dren: reliance
on adult.

out for danger; but we think it a safe proposition that a boy of 13 years, who, at most, is held to no greater care than may reasonably be expected of one of his age and experience,

is not to be held chargeable with negligence as a matter of law, if, when riding in a vehicle driven by a man of mature age, under the circumstances here shown, he relies to some extent upon the driver's superior age, experience and judgment. See *Stotelmeyer v. Chicago, M. & St. P. R. Co.*, 148 Iowa 278. It is not an answer to this suggestion to say that there is no testimony that he did so rely; for it is enough that, under the record as here made, the burden is upon the defendants to negative the presumption that he exercised the caution of the ordinary boy of his years, and, in the absence of evidence, it would be proper for the jury to consider that he might have been influenced by a reasonable reliance on Andrew. Upon a different state of facts, the principle here applied is approved in *Korab v. Chicago, R. I. & P. R. Co.*, 149 Iowa 718.

Further discussion upon the question of contributory negligence as a matter of law is unnecessary. It is proper, however, to add that appellants rely, in this respect, largely

3. NEGLIGENCE:
contributory
negligence:
children: negli-
gence per se.

upon the fact that, as they say, there was a space of from 2 to 8 or 10 steps immediately south of the track where, had the boy or driver looked to the south, the train would have been

visible. The fact, if proved, is a pertinent one for the jury upon the question of contributory negligence, and the jury was properly instructed to give due weight to all the attendant circumstances in reaching its conclusion upon this issue. It certainly is not of itself conclusive of the boy's negligence.

He was not driving the team. If the team was moving at even a moderate speed, it would pass over the interval of 2 to 10 steps very quickly, and the time it would take him to discover the danger and warn the driver, or to arise from his seat and spring from the wagon, if he had the presence of mind so to do, may well have been sufficient to bring him upon the track and into the collision. Certainly the court cannot assume to say that this young boy, in order to relieve himself from the charge of negligence, was bound to dismount from the wagon before it reached the open space and go ahead and make an inspection; and the simple fact that, at a particular point in the route, he might have discovered the train, is not alone sufficient to take the case from the jury. *Moore v. Chicago, St. P. & K. C. R. Co.*, 102 Iowa 595; *Spencer v. Illinois Cent. R. Co.*, 29 Iowa 55; *Selensky v. Chicago, G. W. R. Co.*, 120 Iowa 113; *Correll v. B., C. R. & M. R. Co.*, 38 Iowa 120.

There was no error in the refusal of the trial court to hold the deceased chargeable with negligence as a matter of law. Some of the precedents cited by the appellants announce rules which this court has distinctly refused to follow, while the others are not inconsistent with our conclusions here announced. The law, as we interpret it, has been well settled in this jurisdiction, and a review of the authorities would be simply to repeat what we have said on numerous prior occasions.

II. Counsel have given a separate paragraph of their brief to a re-argument of the rule relating to the presumption of due care based upon the instinct of self-preservation, where

no witness is able to testify of his own knowledge with reference to the conduct of the deceased person alleged to have lost his life through the negligence of the defendant. In

4. NEGLIGENCE: no
eyewitness
rule: rule re-
affirmed.

so far as the argument is designed to secure the overruling or modification of the rule as we have applied it in prior decisions, we have only to say that we are still satisfied with its essential justice and its soundness in principle; and, in so far as our

attention is directed by counsel to the limitation of the rule by which it cannot prevail where the record otherwise shows that deceased could not have exercised reasonable care, it is still to be said that the charge of the court did not overlook such limitation, nor has it been denied due consideration by us in this case.

III. Question is also raised as to the sufficiency of the evidence to sustain a finding of negligence on the part of defendants. That there was sufficient to take the case to the jury,

we have no doubt. Defendant's track makes

5. RAILROADS: accident at crossing: negligence: sufficiency of evidence.

its entrance into the incorporated town of Blanchard around a curve from the east to the station, whence it continues for some distance practically to the north. Something

less than a half mile north of the station, but still within yard limits, the main track and sidetrack are crossed by the course of a lane which has been used for many years as a means of access from the street on the east side of the right of way to a slaughterhouse and stock pens on the west side. Railway stock pens are also in the same neighborhood on the east side. This lane was in daily use by the plaintiff herein, who conducted a meat market in town. It was graded up to the tracks, and the tracks were planked, to facilitate the passage of teams and vehicles. The crossing was made and kept in repair by the railway company. It was used not only by the proprietor of the meat market, but also by one or more other owners of land on the west side of the track, and by farmers who took their cattle and hogs to the slaughterhouse to be butchered. The train which killed the deceased was an hour and a half late, and approached town at a rapid rate. It slowed down somewhat as it approached the station, but passed it at about 25 miles an hour, then immediately speeded up again, and approached the lane crossing at 45 miles an hour, according to the estimate of the engineer. There is a street crossing between the station and the lane, and there is evidence from which the jury could find that the statutory signals of

bell and whistle for this crossing were not given. As the train passed the street crossing, the fireman says that he looked from his window along the track and, seeing no one, turned his attention to firing the engine, and did not look out of the window again until after the collision. The engineer was on the right side of the cab, commanding the window on that side, but saw no one until he caught a glimpse of the team on the crossing, almost at the instant of the crash. Though he endeavored promptly to stop the train, he did not succeed in doing so until it had passed 1,500 feet north of the lane.

All of these circumstances, except as to the failure to sound the crossing signals, are practically undisputed. They show, in the first place, that deceased and his companion were not trespassers. The construction and maintenance of the crossing by the railway company and the years of use thereof by the owners of the slaughterhouse and pens and by the other persons mentioned disclose a consent, if not an invitation, to such use; and the fact that it was what defendants call a private crossing made it none the less the duty of the company to operate its trains over it with reasonable regard to the safety of those who might be rightfully using it. The company must be presumed to have known that the crossing which it had prepared was being used by persons having occasion to pass between the public street and the property on the west side. The duty of reasonable care on the part of a railroad company in such cases includes watchfulness on the part of its servants operating trains, as they approach the crossing, to discover whether it is clear, and to avoid collision with those who may lawfully be passing over it. It may not be incumbent upon them to give the statutory alarm or warning. That we do not decide; but it is enough here to say that

6. RAILROADS: accident at crossing: semi-public crossing: duty.

they cannot send their trains over such crossings at high rates of speed, endangering lives of those in use of the way so provided, and make no reasonable effort to know the condition of the crossing and to avoid the threatened injury. This

duty pertains alike to public and private and farm crossings, though the particular acts of precaution which reasonable care may require in one instance may not be required in another. The care is to be proportionate to the known, or reasonably to be apprehended, peril to be avoided. The rule has its basis in the familiar principle that each person in the exercise of a legal right must use reasonable care to avoid injury and damage to others, and it has been recognized by this court in *Bessler, Admr., v. Wabash R. Co.*, 152 Iowa 449; *Tarashonsky v. Illinois Cent. R. Co.*, 139 Iowa 709; *Clampit v. Chicago, St. P. & K. C. R. Co.*, 84 Iowa 71, and *Booth, Admr., v. Union Terminal R. Co.*, 126 Iowa 8.

The question as to what precaution due care required in the operation of this particular train was for the jury. Even if there was no statutory duty to sound the whistle or bell for

7. RAILROADS: accident at crossing: statutory signals: semi-public crossing.

the lane crossing, such duty did exist as to the street crossing just south of that place, and, as we have seen, there was evidence from which the jury could find that the signals were

not given. Such omission may be negligence with respect to the safety of persons lawfully crossing the track at another place in the same vicinity. *Sanborn v. Detroit, B. C. & A. R. Co.*, 91 Mich. 538; *Cahill v. Cincinnati, etc., R. Co.*, 92 Ky. 345; *Ward v. Chicago, B. & Q. R. Co.*, 97 Iowa 50. It is also competent evidence for the plaintiff, as bearing upon the issue of contributory negligence. *Heise v. Chicago, G. W. R. Co.*, 141 Iowa 88, 93. See, also, *Swift v. Staten Island B. T. R. Co.*, 123 N. Y. 645; *Owens v. Pennsylvania R. Co. (Pa.)*, 41 Fed. 187.

If, then, the jury found that the signals were not given, and drew therefrom the conclusion that due care had not been exercised, its further inference that such negligence was the

8. RAILROADS: accident at crossing: lookout: failure to keep: negligence.

proximate cause of the collision on the lane crossing cannot be said to be without support.

The propriety of this result is emphasized if we assume, as we may, in support of the

verdict, that the jury found that the engineer and fireman, or either of them, negligently failed to keep a proper lookout, and that such care on their part would have avoided the accident. Such a finding has ample support in the facts, even as they are shown by the appellants. It is admitted that they ran their train past the station at 25 miles an hour, and immediately, and while still in the yard and approaching the crossing, increased its speed to 45 miles an hour. While this speed was perhaps not negligent *per se*, it was within the province of the jury to find that, under all the circumstances disclosed in evidence, it showed a want of reasonable care. Appellants' contention, that the view between the crossing and the train was open and clear, is an argument which cuts both ways; for in such a case it would be an allowable conclusion of the jury that, in the exercise of their duty to look out for the crossing, the engineer and fireman could have discovered the deceased and the team in time to give an effective alarm, or to reduce the speed of the train, and thereby avoid the collision. At least we cannot say as a matter of law that the act of the fireman in withdrawing his attention from the outlook and giving it to the coaling of the engine until the mischief had been done, and the act of the engineer in keeping his gaze upon a window, which from his seat commanded only a part of the right of way, during the time when he alone was on watch, were not negligent. It is true, as counsel argue, that the duty of a fireman is of varied character, and he is not required to keep his eye glued on the right of way, but must perform his other duties also. But this does not turn the point of plaintiff's proposition that, if proper watch or lookout at those points of peculiar danger to persons who may be lawfully crossing the track had been kept, the accident would not have occurred. There is no showing that this duty might not have easily been done without interfering with due regard by both fireman and engineer to their other duties. If there was any reason why the engineer could not have refrained from speeding up the engine until he was past this crossing and out of the

station yard, or why the matter of coaling the engine could not have been delayed a matter of five or ten seconds, it is not shown in the record. It is quite apparent that neither of them at that time had any thought of this crossing as calling for any greater care on their part than the right of way generally. Without pursuing the subject any further, we hold that the court did not err in submitting to the jury the question of due care.

IV. Error is assigned upon a ruling excluding the answer of a witness who was asked upon part of the defendants whether the crossing where the collision took place was public or private. The ruling was correct. The

9. EVIDENCE:
opinion evi-
dence: conclus-
ions: non-ex-
pert matters.

question called for the witness' opinion or conclusion upon facts which were entirely undisputed. If the question was material, it was not of a character to call for expert testimony, and the jurors were entitled to draw their own conclusions and inferences from the proved or conceded facts. If it be thought a question of law, then it was for the court, and not the witness. Moreover, the court explicitly instructed the jury that the crossing was not a public one at which statutory signals were required, thus interpreting the issues and narrowing the range of inquiry by the jury in a manner as favorable to the defendants as could be asked upon any theory of the case. There is no merit in the objection here considered.

V. The evidence tended to show that plaintiff, the father of the deceased boy, was the proprietor of a meat market; that the boy assisted his father in and about the business and

10. DEATH: dam-
ages: evi-
dence: occu-
pation of par-
ent of de-
ceased child.

“took a man's place in helping in the store, in butchering and in cutting up and delivering meats.” He was also described as being intelligent and in good health. Over the objection of the defendants, plaintiff was permitted to testify that the reasonable wages of a butcher and meat cutter were \$15 a week. We think it not incompetent or immaterial. In the first place, the boy was shown to have already acquired

considerable experience in the business. He was still a minor, and there was some presumption that he would still continue in the business, at least during his minority. Even if the testimony objected to had reference to an experienced man in this kind of business, the value of the services of a man would be of some assistance in arriving at the value of the labor of a boy whose comparative age, experience and capacity have been shown. Moreover, the boy, with each passing year, would, if living, have become more experienced and efficient, and might well be earning full wages long before he was 21 years of age, and the fact as to the ordinary wages of a man in such employment was something that the jury was entitled to know.

VI. Most of the exceptions taken to the instructions in proper time and argued to this court are to the effect that the several paragraphs relating to the matter of negligence on the

11. TRIAL: in-
structions:
requisites and
sufficiency:
test of prepon-
derance of tes-
timony.

part of defendants ought not to have been given, because the evidence was insufficient to support a finding of any want of due care on their part. So also it is contended that all instructions upon the questions of contributory negligence are erroneous, because the plaintiff as a matter of law, failed to show due care on the part of deceased. These points have already been ruled upon contrary to appellants' contention, and need not be further considered.

Objection is made to the court's statement to the jury that the test of "preponderance and weight of the testimony is where you believe the truth to be after hearing all the evidence." Counsel do not state what they claim to be the error of this instruction, except that it "throws the door wide open for the jury to do what they please." The language of the court at this point is perhaps too brief and epigrammatic to be quite exact, but we fail to discover in it any prejudicial error. It in substance says to the jury that the weight and value of testimony are in proportion to its persuasive or convincing effect upon the mind of the person who gives it his

candid consideration, and this, we think, is correct. Still further, the quoted language is a sentence taken out of the body of a paragraph upon the proper consideration of evidence, and when thus segregated, does not quite fairly reflect the substance of the instruction as a whole.

VII. The defendants asked the submission of five special interrogatories to the jury, as follows:

“Int. I. What would Ralph Johnston have earned each year, had he lived, during the first four years after the date of his death, less the fair and probable cost of his clothing, maintenance and care and such matters, inseparably connected with his bringing up by his father?”

12. **APPEAL AND
ERROR: assign-
ment of error:
omnibus as-
signment.**

“Int. II. What would Ralph Johnston have earned each year, had he lived, from his 17th birthday to his 21st birthday, above the fair and probable cost of his clothing, maintenance and care and such matters as are inseparably connected with his bringing up by his father?”

“Int. III. If you find from the evidence any sum so earned by him yearly until he should arrive at 19 years of age; and, further, if you should find in any sum that he would so earn above such expenses and keep for each year from his 19th birthday to his 21st birthday, then what do you find the present value of said sum to be?”

“Int. IV. Did Ralph Johnston look and listen for an approaching train from the south at any time after entering the right of way of the Wabash railroad, up to the time the team was driven upon the crossing?”

“Int. V. Did Ralph Johnston look and listen for an approaching train from the south at any time after passing the line of telegraph poles within the right of way of said Wabash railroad, and before the team was driven upon the crossing?”

The error assigned upon the refusal of these requests is omnibus in form; that is, that the court erred in not submit-

ting the interrogatories so asked. The argument thereon is equally general and indefinite—a method of presentation which we have frequently said raises no question which we can consider. But, waiving such formal requirements, we must further say that the interrogatories were directed to matters of only incidental importance, and are more of a cross-examination of the jury than requests for findings of fact vital to the integrity and conclusiveness of the verdict.

There were also requests for other instructions which were denied. An examination of the record shows that, in so far as the requests set forth sound rules of law applicable to the case, they were sufficiently covered by the charge prepared by the court, and it was not error to refuse to restate them.

Accompanying the exceptions taken to the court's charge to the jury is one said to be upon a ruling which gave counsel for defendants but 15 minutes to prepare and submit their objections to the several paragraphs or instructions. Neither in the exception nor in counsel's brief are we directed to any place in the record where a limitation of that kind was imposed upon counsel, and after considerable search we have been unable to find it. An exception without a record upon which to base it presents nothing for the action of this court.

VIII. In the course of the trial, counsel for the defendants asked a witness in their behalf concerning certain physical facts in the neighborhood of the place of the accident. The trial court, apparently understanding that the matter referred to had been shown by a map already in evidence, the correctness of which neither party denied, interrupted the examination suggesting that it was unnecessary to proceed further in that line; but, counsel being insistent, the court peremptorily ordered him to stop, saying, among other things, that "the flip remarks of counsel are resented by the

13. TRIAL: special interrogatories: attempt to cross-examine jury.

14. APPEAL AND ERROR: exceptions: necessity for record.

15. APPEAL AND ERROR: harmless error: criticism of counsel by court.

court." Exception was taken thereto, and it is argued that the language was uncalled for and served to materially prejudice the defense. The most which can be said of the episode is that it evidences a little acerbity of temper on the part of the court, growing out of a misunderstanding of the purpose of the questions being put by counsel, who, we have no doubt, was acting in entire good faith. Judges and counsel are human, and it is inevitable that, in the stress of a protracted and hotly contested trial, there will be at times flashes of impatience and momentary misunderstandings, where neither intends to be unjust or to trespass upon the province of the other; and sharp words are indulged in which a little reflection would have repressed; but they do not often have any effect to prejudice the rights of a litigant. We can presume no such prejudice in this case, where the language of the court of which complaint is made had no reference whatever to the defendants or to the merits of the controversy being tried. While the circumstance is to be regretted, it is not of a character to justify an order for a new trial.

In other exceptions to which some attention has been given in argument and not covered by the discussion already had, we find nothing of merit which calls for further extension of this opinion. The case appears to have been fairly tried, without prejudicial error, and the judgment below is—*Affirmed*.

EVANS, C. J., DEEMER and PRESTON, JJ., concur.

LIBBIE KEEN, Appellant, v. CONTINENTAL CASUALTY CO.,
Appellee.

INSURANCE: Accident Policy—General and Limiting Clauses—

- 1 **Construction.** A general clause in a policy of accident insurance, providing a certain indemnity in case of death by accidental means, does not render nugatory a subsequent specific clause, limiting the

indemnity in case an accidental injury results in certain named diseases. So held in case of an injury resulting in hernia. Liberty of contract justifies such a contract.

PRINCIPLE APPLIED: In instant case, the general clause promised to pay the full named indemnity, "in the event that said insured, * * * shall receive personal bodily injury, which is effected directly and independently of all other causes through external, violent and purely accidental means * * *" The specific clause limiting liability was: "In *any* of the losses covered by this policy * * * where the accidental injury causing the loss results in *hernia*, * * * the amount payable shall be *one fourth* of the amount which otherwise would be payable under this policy, anything in this policy to the contrary notwithstanding, and subject otherwise to all the conditions in this policy contained." *Held*, the limiting clause applied where the deceased slipped, suffered a hernia, and died solely therefrom.

INSURANCE: Accident—Existence of Disease or Bodily Infirmary—

- 2 **Evidence.** Under a policy of accident insurance agreeing to pay indemnity "provided that neither such injury nor inability is in consequence of nor contributed to by any bodily or mental defect, disease or infirmity of the insured," evidence reviewed, and held to justify the finding that deceased was not suffering from hernia prior to the accident, and that there was no disease or bodily infirmity which was the cause of the death.

INSURANCE: Trial—Existence of Disease or Bodily Infirmary—In-

- 3 **structions—Sufficiency.** Instructions reviewed, and held to sufficiently present defendant's claim that deceased did not die solely from an injury effected through accidental means.

Appeal from Pottawattamie District Court.—THOMAS
ARTHUR, Judge.

MONDAY, OCTOBER 4, 1915.

REHEARING DENIED FRIDAY, APRIL 7, 1916.

ACTION at law upon an accident insurance policy for \$5,000 issued to William W. Keen, deceased, and payable to him or his wife, Libbie Keen, the plaintiff. There was a renewal of the policy, under the terms of which its value was

to increase each year \$250. At the time of the renewal, the indemnity for death was \$6,750. The policy also provided:

"In the event that insured, while this policy is in force, shall receive personal, bodily injury, which is effected directly and independently of all other causes, through external, violent and purely accidental means, and which causes at once total and continuous inability to engage in any labor or occupation, and which is not in consequence of nor contributed to by any bodily or mental defect, disease or infirmity of the insured."

Plaintiff sued for the full amount of the policy. At the close of all the evidence, defendant moved for a directed verdict, which motion was overruled. The court instructed that, if plaintiff recovered, the recovery could be only for one fourth the amount of the policy, and submitted special interrogatories, which will be set out in the opinion. The jury found for plaintiff in the sum of \$1,817.15. Plaintiff moved for judgment on the special findings for the full amount of the policy; also moved for new trial. Both motions were overruled, and judgment rendered for the amount stated. Plaintiff appeals from the refusal of the court to allow the larger recovery. Defendant also appeals from the overruling of its motion to direct a verdict and from the judgment rendered. Defendant first served notice of appeal, but filed no abstract until after plaintiff had perfected her appeal by serving notice, filing abstract and argument. Plaintiff will be treated as appellant.—*Affirmed on both appeals.*

I. N. Flickinger & George S. Wright and Clifford Powell,
for appellant.

Saunders & Stuart and M. P. Cornelius, for appellee.

PRESTON, J.—1. It is necessary that a further brief statement of the record be made. A further provision of the policy is:

“Where accidental injury results in hernia . . . the amount payable shall be one fourth of the amount which otherwise would be payable under this policy, anything in this policy to the contrary notwithstanding, and subject otherwise to all the conditions in this policy contained.”

1. INSURANCE: accident policy: general and limiting clauses: construction.

In the application by deceased, he stated:

“I have not now nor have I had any infirmity or defect in mind or body. I am not now suffering from hernia nor any periodical, chronic, mental or physical disease.”

Defendant pleaded these provisions, and alleged that, at the time the application was made, the insured had hernia, and that, if the insured suffered any injury as alleged, such injury resulted in hernia, and by reason thereof the defendant is liable for only one fourth of the amount due. For reply, plaintiff denied that deceased was suffering from hernia or any other disease. The court instructed that, if the jury found from the evidence that deceased had hernia at the time of the application, they need proceed no further, but should return a verdict for defendant, and, as before stated, that in no event should plaintiff recover more than \$1,817.15. The interrogatories submitted to the jury and the answers thereto follow:

“(1) Q. Was William W. Keen afflicted with the disease known as hernia when he made his application for insurance, on the 9th day of January, 1908? A. No.

“(2) Q. Was the injury, if any, to William W. Keen a personal bodily injury, effected directly and independently of all other causes through external, violent and purely accidental means? A. Yes.

“(3) Q. Was the injury and death of William W. Keen contributed to or caused by any disease or infirmity other than the accident? A. No.

“(4) Q. Was the deceased, William W. Keen, just

prior to the date of the alleged injury, September 6, 1911, afflicted with the disease called hernia? A. No.

"(5) Q. Was the injury and death of William W. Keen solely the result of injuries sustained while lifting or attempting to lift a boat? A. Yes."

We are of opinion that the evidence is undisputed that the injury resulted in hernia. We do not understand plaintiff to contend otherwise. The plaintiff's propositions and argument are that prior provisions of the policy provide for the payment of \$5,000 where the insured shall receive personal, bodily injury which is effected, directly and independently of all other causes, through external, violent and accidental means, etc., and that such conditions must be construed most strongly against the insurer and, taken together with other provisions, they must be held to apply to such disease or bodily or mental infirmity as in some manner contribute directly or indirectly to the death; that it is not enough to defeat recovery to show either disease or bodily or mental infirmity, citing *Vernon v. Iowa State Traveling Men's Assn.*, 158 Iowa 597; *Binder, Admr., v. National Masonic Accident Assn.*, 127 Iowa 25; that death resulting from disease which follows as a consequence of a physical injury is an accidental death within the meaning of the policy, citing *Delaney v. Modern Accident Club*, 121 Iowa 528; also the fishbone case, *Jenkins v. Hawkeye Com. Men's Assn.*, 147 Iowa 113; that, where a policy excepted liability from hernia, death from strangulated hernia caused by the external violence and followed by a surgical operation was covered by the policy, not being included within the terms of the exception, and the company is not relieved from responsibility where hernia is caused by external injury, citing cases; that, where hernia was excepted in the policy, and the insured fell and became afflicted with strangulated hernia, resulting in a surgical operation and death, the policy is to be construed that death from hernia caused solely and directly by external violence and a necessary surgical operation was not within the exception, citing

cases; that death resulting from a fall is covered by the policy, although the fall might have been due to a temporary disease, the fall and not the disease being the proximate cause of death, citing *Meyer v. Fidelity & Casualty Co.*, 96 Iowa 378; that, where death from a rupture of a kidney produced by an accidental fall is the result of the accident, independent of other causes, the injury is within the provisions of the policy, although a cancerous condition of the kidney made the rupture possible, citing *Fetter v. Fidelity & Casualty Co.*, 174 Mo. 256 (61 L. R. A. 459).

Counsel for plaintiff concede that, if the death may have resulted from either disease or accident, there is no presumption as to the cause of death, but contend that the burden of proof is on the insurer to show that the cause of death was disease, and not accident, citing the *Fetter* case, *supra*, and other cases.

It is plaintiff's contention that all questions of interpretation are eliminated by the special findings of fact of the jury, which furnish no basis for the defendant's contention, and show that the injury and death were the direct and immediate result of the injury, without the intervention of any preceding or subsequent disease. Some of these propositions are pertinent to the inquiry as to whether plaintiff is entitled to recover in any amount. But here we have a specific provision of the policy that, if an injury results in hernia, the recovery is to be but one fourth the amount which would otherwise be payable, notwithstanding other provisions of the policy. It is contended by defendant that the liability of the company under the express provisions of the policy is limited to one fourth of the amount otherwise due, and there can be no recovery in excess of that sum, and that provisions in policies of accident insurance stipulating for non-liability, or for a reduced liability in the event that the insured is injured under certain conditions or in certain designated ways, or in the event that the accident results in certain designated bodily injuries, are valid, and have been universally sustained by the courts, citing

Flower v. Continental Casualty Co., 140 Iowa 510; *Little v. Iowa S. T. M. Assn.*, 154 Iowa 440; *Continental Casualty Co. v. Fleming* (Ky.), 124 S. W. 331; *Continental Casualty Co. v. Morris* (Texas), 102 S. W. 773; *Diddle v. Continental Casualty Co.* (W. Va.), 63 S. E. 962. We are of opinion that the trial court did not err in limiting the recovery to one fourth.

2. Deceased and his wife were at Bald Eagle Lake, Minnesota, at the time of the alleged accident. On the morning of September 6, 1911, he went to the lake, a short distance from the house, to go fishing. It had rained

2. INSURANCE: accident: existence of disease or bodily infirmity: evidence.

the night before, and there was water in the boat which he was to use. Plaintiff's claim is that there was water in the boat and that deceased attempted to turn it over to turn the water out, and slipped, and felt something break loose inside of his bowels. There was no one but deceased present at that time. Declarations of deceased claimed as part of the *res gestae* are shown as to the cause of the injury. There is evidence that, when deceased returned to the house, he complained of severe pain, physicians were sent for, and an examination disclosed that there was then a hernia, which developed into a strangulated hernia. He was taken to Omaha, where an operation was performed to relieve the patient. He died of peritonitis in two or three days. There is no question for us as to whether the deceased was injured in the manner claimed, because counsel for defendant concede in argument that:

"The undisputed evidence clearly established that the death of the insured was brought about by the strangulation of an umbilical hernia; that if this hernia did not exist prior to the alleged accident, then, under the evidence, it must necessarily have been caused by the accident, in which event, under the terms of the policy, the company's liability would be one fourth the amount otherwise due. The trial court was confronted with this situation; the undisputed evidence showed that death was caused by strangulated hernia. If the hernia existed prior to the accident, there was no liability. If the

accident caused the hernia, there was a liability of one fourth. . . . The court concluded that there was a conflict in the testimony as to whether the hernia existed prior to the alleged accident or was caused by it. It instructed the jury, in effect, that they should find that the defendant was not liable in any amount if the hernia existed prior to the accident; that, if the alleged accident was the cause of the hernia, then the limit of the defendant's liability was one fourth. . . . While we feel very strongly that the verdict of the jury to the effect that the insured did slip and that the necessary element of accidental means was present, was against the overwhelming weight of the evidence, we shall not urge that the trial court erred in not taking the case from the jury on that ground, and we shall not consider this question in our argument. . . . The undisputed evidence shows that the injury was not the cause of death. . . . We contend that the trial court should have directed a verdict for the defendant, because the undisputed evidence showed that, even if the insured did receive an injury through accidental means, such injury was not the sole cause of death independent of pre-existing defect or infirmity. This is the only ground upon which we now ask reversal. . . . The undisputed evidence shows that Keen was suffering from a hernia, or bodily defect, at the time of this alleged accident, and that this infirmity was at least one of the causes of death."

The point then, and the only point, for determination on defendant's appeal, is the one indicated in the foregoing quotation from defendant's brief. Evidence was introduced on behalf of defendant that deceased had hernia before the injury, and, had the jury so found, such finding would have had sufficient support. But, after a careful reading of the record, we think that there was sufficient evidence to support the verdict and special findings of the jury, and that the deceased was not so afflicted at the time of his application or at the time of the accident. We shall not attempt to refer to all of it.

Deceased was about 60 years of age, 6 feet in height; weight, 240 to 250 pounds. He had been a railway conductor, but, for some years prior to his death, he had been baggage man. He was somewhat corpulent, and for a year or such a matter before his death, had been wearing a rubber obesity belt one foot wide in front, but it did not reach up to the navel. It is plaintiff's contention that this belt was worn by deceased for his comfort because he was required to be on his feet a great deal. Plaintiff testified that deceased went to the lake on September 4, 1911, for a vacation; that, when he came to the lake, he was in his usual robust health—no disease of any nature whatever; never had complained of any ailment whatever.

"Next morning he was suffering such intense pain we called the doctor. When the doctor came the first time, he did not make an examination of the bowels, but did the second trip. The second visit was about three hours after the first. At this time, he made a personal examination of Mr. Keen's body, and I saw the stomach and bowels at that time. The tissues seemed very much swollen and inflamed, and the intestines protruded about three inches, as near as I could tell. There seemed to be much swelling and inflammation. At that time, he was moaning and writhing with pain and had high fever. Dr. Francis said there were indications of peritonitis. After I found the condition of Mr. Keen, we came on the first train to Omaha. The doctors made an examination and said it was necessary to have an operation. They operated Saturday afternoon, September 9th, and he lived until the next Tuesday morning. After we left the lake, the swelling of the abdomen and the intestines increased and the protrusion of the intestines increased. The protrusion of the intestines was at the navel. There had been no protrusion of the intestine in the navel prior to the time he went to the lake. About a year prior to the time there had been a sort of swelling or projection not bigger than a hazelnut at the navel. It was about this time that he secured the belt which he wore from

the time he got it and was wearing it at the time he came to the lake. After the injury, we could feel the intestine in the sac. When I first saw this after he came back from the boat landing, it was about half the size of an egg and kept increasing in size." ?

Dr. Jonas, testifying for defendant, testified as to deceased's consulting him about a belt about a year before, and says:

"At that time there had been no pressing of the intestines through the lining. There was no breaking through of the peritoneal lining at all or of the intestine at that time, nor anything of the kind. He did not complain of any pain in the umbilicus. Saw him next in the hospital, September 6, 1911, suffering from peritonitis. There was nothing to indicate that his prior condition was the cause of his condition then. In my opinion, his condition was due to an accident, lifting the boat and straining. His death was from peritonitis, induced by the strangulation resulting from attempting to lift the boat. The cause of his death was hernia only as connected with the strain and the lifting of the boat. The diagnosis of his condition in the hospital would be attributed to the strain in lifting the boat. The strain of lifting the boat caused the protrusion of the intestine, and the strangulation created inflammation at that point which developed in peritonitis, which caused his death. Next to the groin, the navel is the weakest point in the abdominal region."

Dr. Francis, testifying for defendant, said he saw deceased at the lake on September 7th.

"I asked him as to his condition and the probable cause of it. Told me he thought it was something he ate that didn't agree with him. I did not find a protrusion of the intestine at the umbilicus. I pronounced it an obstruction of the intestine. About a month after the injury, I wrote the following letter to Mrs. Keen: 'Dear Madam: I have not heard from any insurance company, but I firmly believe that his death was due to an accident.'"

In his testimony as a witness, he claimed that he had omitted the word "not;" that his death was not due to an accident.

"I told you he had an obstruction of the bowels. I was pretty firmly of the opinion at that time it was hernia. I never found it out personally, but I was told so. I received the ordinary fees as paid in this state for this kind of testimony—\$50—which has already been paid."

This is not all the testimony of the doctor. He gave evidence against plaintiff and explained some prior statements made by him.

Mrs. Keen testified, in rebuttal, that:

"At the time the policy was issued, Mr. Keen did not have a hernia or anything that indicated in the slightest a sign of a hernia; that up to the time he went to Bald Eagle Lake he did not at any time make any complaint of pain in his stomach or bowels or a hernia. About a year before his death there was a small knot of fat, it protruded at the navel and was caused by a cough he had. The largest I ever saw it, it was about the size of a hazelnut; there was never any complaint of pain or suffering by Mr. Keen in connection with that; Mr. Keen did not ever have a hernia or trouble or disease for 20 years prior to the injury, that I know of."

Witness Schonlau testified:

"Am assistant station master at the Union Station at Omaha. Had known Mr. Keen six or seven years, never knew of his being ill or sick in that time; I was with him several times a day just before he went to the lake in September. He was on his feet almost constantly, 11 or 12 hours a day; never heard him make any complaint of pain. Shortly before he went to the lake in September, I saw the front part of his body naked; I didn't notice any indication of a protrusion of the navel. When he took the train to go to the lake, he was in perfect health, as far as I could see."

Witness Nichols says:

"I knew Keen 10 years; I lived in the house with him a

year and half. He was a fine looking man and very active and well for his size. I never saw anything wrong with him in any way, shape or form or heard him complain. He was very energetic and active."

Dr. Hanchett, physician and surgeon for 34 years, says:

"I am acquainted with the manifestations of what is called an ordinary hernia. Q. Supposing a fleshy man, weighing about 250 pounds, should have a protrusion at the navel, say, about the size of a hazelnut, which increased or decreased in size from coughing, and suppose that had existed for several years, but no pain or inconvenience to the patient is noticed, no discomfort; to what would you ascribe that condition—that of hernia or otherwise? A. Well, that might be simply the development of the external parts without any hernial protrusion through. It might be hernial, of course, but we should expect that there would be pain and discomfort, and if it was a growth, and of only that very small size, it would hardly be called a hernia at that point. Q. If it was a hernia, such as a protrusion of omentum or of peritoneum in a sac of that kind, it would be ordinarily accompanied with pain or discomfort? A. It would be likely to be; yes, sir."

On cross-examination, in answer to defendant's hypothetical question based upon its assumed state of facts, but as to which there was a conflict, witness answered that, if such facts were true, it would indicate a hernia of some considerable duration, but that upon such a state of facts, there would be pain or discomfort. In answer to a similar question, Dr. Tinley said it could and could not be hernia; that:

"The feeling of the mass, the location and the increase and decrease in size would have to be the guide by which it was judged, and our ability to reduce the same. If there was bulging from coughing and a deficiency in the muscular wall at that point—you would have to take the two points in consideration—there would be a suspicion of hernia, but not positive evidence of it. There is almost constant pain while there is a bulging. A congenital opening in the wall through which

a hernia might pass, although the hernia had not yet passed through it, would be a defect in the physical make-up. I would have to say it would be abnormal, but it would be a common abnormality. A man in normal or perfect condition would not have such an opening there. A lean man is just as apt to have hernia as a fat man. Q. Isn't it a fact that a large percentage of people beyond 60, who are fat, have more or less a sort of a navel protrusion—navel prominence by reason of being fat, than others? A. Yes, sir. Q. Suppose, for instance, a man is lifting a boat and slipped and he at once had strangulated umbilical hernia causing peritonitis and death; that for eight or ten years he had had that slight protrusion as referred to with no discomfort or pain, etc., would you ascribe the umbilical hernia to former condition, or to the fact that he had slipped in trying to lift the boat and throw out the water? A. No question from what has been stated but that there was a rupture of the intestine brought down there by the strain."

Witness Quinn says that Mr. Keen was in the habit of passing the residence of the witness, passing up and down the hill nearly every day and that he never noticed anything wrong with him.

Witness Cook lived near Mr. Keen and had seen him mowing his lawn a great many times; made neighborly calls; never heard him complain of hernia.

Such, in a general way, is the evidence introduced by plaintiff on this point, and we think it is sufficient to show that the jury could have found that deceased was not suffering from hernia prior to the accident, and that there was no disease or bodily infirmity which was a cause of the death. The defendant's evidence was not undisputed, as it contends, but there was a conflict which was for the determination of the jury.

There is no claim by defendant that deceased had any other disease prior to the injury. Because of this conflict, we deem it unnecessary to discuss at any length the cases cited

by defendant, to the effect that there could be no liability for a disability happening directly or indirectly, wholly or in part, because of or resulting from any disease or bodily infirmity, as some of the policies in the cases cited provide. Defendant's citations are *Binder v. Association, supra, Delaney v. Company, supra, Vernon v. Association, supra*, and other like cases. But we are of opinion that, in the instant case, the court, by its instructions, covered all that defendant claims for its cases.

The trial court instructed:

"(9) Among other things, the policy in suit provides for payment of indemnity in the event that insured 'shall receive personal bodily injury, which is effected directly and independently of all other causes through external,

3. INSURANCE:
trial: existence
of disease or
bodily infirm-
ity: instruc-
tions: suffi-
ciency.

violent and purely accidental means, and provided that neither such injury nor inability is in consequence of nor contributed to by any bodily or mental defect, disease or infirmity of the insured.' And you are instructed that such provision is binding upon the plaintiff and the defendant in this case.

"(10) It is contended by the defendant company that, prior to and at the time of the alleged accident, the insured had on his person, at his navel, a hernia, and that such hernia developed into the strangulated hernia which afterward appeared at the identical same place, and that such smaller hernia contributed to causing the strangulated hernia and the death of the insured, and that the accident, if there was one, was not the sole and only cause of the death of the insured. On the other hand, the plaintiff, while admitting that there was a small protrusion or lump at the navel, before the accident, claims that it was not hernia, and that it in no wise contributed to the death of the insured. The burden of proof is upon the plaintiff to establish by the evidence that William W. Keen received a personal, bodily injury, effected directly and independently of all other causes, through purely accidental means, and that his death resulted necessarily and

solely from such injury. If she has so shown by a preponderance of the evidence, and the other matters necessary to her recovery have been shown, under these instructions, then she will be entitled to recover in this action. But, if she has not thus shown by the evidence, your verdict must be for the defendant. If you find from the evidence that the death of the insured was contributed to by the bodily defect existing at his navel before the accident, if there was an accident, then you must find for the defendant. If you find from the evidence that the insured did in fact suffer an accidental injury substantially as claimed by the plaintiff, and as described in other instructions herein, and that such injury aggravated a bodily defect present at the time, at the navel of the insured, and co-operated with such defect in causing the death of the insured, then under such circumstances, if you should so find them from the evidence, the plaintiff cannot recover in this action, and you must find for the defendant. Whether or not the accident in question, if you find there was an accident, was the proximate and sole cause of the death of William W. Keen, is a question of fact for you to determine from the evidence, governed by the foregoing instructions, on that matter. In deciding said matter, you should consider the physical condition of the insured prior to the alleged accident and afterwards, as shown by the evidence, and all the facts and circumstances in evidence bearing thereon.

“(11) If you find from the evidence that insured was free from hernia at the time he made the application for the policy in suit, and you further find from the evidence that the insured did in fact suffer an accidental injury effected directly and independently of all other causes through purely accidental means, and that the death of William W. Keen resulted necessarily and solely from such injury, as hereinbefore instructed, then plaintiff will be entitled to recover in this action; but if such matters are not so shown, your verdict must be for the defendant.”

These instructions are as favorable to defendant as it

could ask. Some of plaintiff's cases have already been referred to in Paragraph 1 of the opinion. They also rely on some of the cases cited by defendant and the following additional authorities: *Thornton v. Travelers' Ins. Co.* (Ga.), 42 S. E. 287; *Fetter v. Casualty Co.*, *supra*. But, for the reasons already stated, we deem it unnecessary to refer further to the cases.

Plaintiff's motion to strike defendant's argument is overruled. The judgment and rulings of the trial court are—*Affirmed on both appeals.*

EVANS, C. J., DEEMER and WEAVER, JJ., concur.

C. M. KIMBRO, Appellee, v. JAMES I. MOLES, Appellant.

NEGLIGENCE: Contributory Negligence—Automobile Accident—

- 1 **Evidence—Sufficiency.** Evidence reviewed, in an action by plaintiff for personal injuries suffered in an automobile accident, and *held* to present such conflict as to preclude a directed verdict on the ground that plaintiff was guilty of contributory negligence.

APPEAL AND ERROR: Harmless Error—Abstract Instructions.

- 2 Giving an instruction, incorrect as an abstract proposition of law, but pertinent to the evidence in the case on trial, is not necessarily reversible error. So *held* in an automobile accident, where the court told the jury that it was the duty of the defendant to stop his car on signal to do so, without any qualifying statement as to the presence of danger.

TRIAL: Reception of Evidence—Order of Proof—Discretion of Court.

- 3 Testimony which is admissible, for any reason, on rebuttal is not rendered inadmissible because it might have been received on the main case.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

FRIDAY, APRIL 7, 1916.

ACTION for personal injuries sustained by the plaintiff as a result of an automobile collision, the plaintiff having been struck and run over by defendant's automobile. There was

a trial to a jury and a judgment for plaintiff on the verdict. The defendant appeals.—*Affirmed*.

Voris & Haas, for appellant.

Rickel & Dennis, for appellee.

EVANS, C. J.—I. At the close of the evidence, the defendant moved for a directed verdict, on the ground that the plaintiff had failed to show herself free from contributory negligence. This motion was overruled by the court. The point was again urged in the lower court by a motion for a new trial and was again overruled. The weight of appellant's argument herein is directed largely to this contention. The accident occurred on August 15, 1913, at about five o'clock P. M. It occurred upon the highway in the presence of many eyewitnesses. These, however, do not agree in their testimony as to many details thereof. The place of the accident was on a north and south highway on the southern slope of a sandy hill. Prior to the appearance of the defendant on the scene, a mishap had occurred on this hill which resulted in the assembling of 8 or 10 persons and 3 automobiles thereon. The 3 automobiles were owned respectively by Briney, Green and Ingersoll. The traveled part of the road was very narrow. The width of the road from fence to fence was 40 feet. A few feet inside the fence on each side of the highway were shallow ditches. Between these there was a crown of traveled track. This traveled track contained two ruts, or wheel tracks. Briney, going up hill in a northerly direction, and Green going down hill in a southerly direction, met and passed each other on this hill. Briney, however, was thereby crowded into the ditch on the east side of the road and became "stuck" therein. Green stopped near the foot of the hill and came back to his aid. At about the same time, Ingersoll came over the hill from the north and stopped also to

1. NEGLIGENCE:
contributory
negligence: au-
tomobile acci-
dent: evidence:
sufficiency.

render aid. Mrs. Kimbro was riding with Green. Briney had passengers, consisting of women and children. While the men were trying to extricate Briney's automobile from the ditch on the east side, the woman and children took a position on the west side of the highway. Green had turned about his automobile and brought it up to a position in front of Briney's with a view of pulling the Briney car out of the ditch. The left front wheel of Green's car either occupied the east wheel track of the traveled road or was very close to it. Ingersoll had driven his automobile to the foot of the hill on the west side of the road and had stopped it there, preparatory to going back to the aid of Briney. At this juncture, the defendant, Moles, appeared in his automobile, coming from the south. He undertook to drive up the hill between the automobiles on the east side of the road and the women and children on the west side of the road, with the result that his automobile ran over the plaintiff, Mrs. Kimbro. The testimony on behalf of the plaintiff was to the effect that Moles was driving at a speed of 25 or 30 miles an hour; that he was signaled by Ingersoll at the foot of the hill to stop; that he did not slow down, but went up the hill without slacking his speed; that, as he approached the automobiles on the side of the hill, he swerved his car to the west in a northwesterly course and in the direction where the women and children were standing, and that he thereby ran over the plaintiff.

On the other hand, the testimony on behalf of the defendant was that he saw the gathering on the hillside before he approached the foot of the hill; that he did slow down; that he changed to low gear; that he went up the hill at the rate of 6 or 8 miles an hour; that he held to the beaten track; that, as he came between the automobiles and the standing women and children, the plaintiff, for some unaccountable reason, rushed across the road in front of his car; that she was so close to him that he did not have time to stop.

Concededly, the defendant's automobile, after striking the plaintiff, ran in a northwesterly direction across the west side

ditch and into the fence. This is accounted for by the defendant by the fact that he became unnerved by the accident and momentarily lost control of his car thereafter. As to the differing details of the accident herein indicated, the evidence is in irreconcilable conflict, the record containing the testimony of twelve witnesses. Of these twelve, six appear to have been disinterested, three of them testifying for the plaintiff and three for the defendant. The testimony, however, of all the witnesses, both interested and disinterested, appears candid.

The argument of appellant at this point deals with the relative weight of the testimony and the corroborating probabilities. Accepting, however, the version of the accident as detailed by plaintiff's witnesses, there can be little ground for the claim that the defendant was entitled to a directed verdict. The conflict of evidence clearly presented a question for the jury, and the trial court properly refused to direct a verdict. It would be useless for us to enter into any argument as to the weight of the testimony, pro and con. Each story has its corroborating circumstances which lend support to plausible argument on either side, so far as the facts are concerned.

II. The defendant complains of one of the instructions of the trial court, known as No. 10. This instruction charged the jury that it was the duty of the defendant, if he saw the signals referred to in the testimony, or saw the plaintiff in a dangerous position in front of his car, to slow down and stop his car. The plaintiff had testified that, just before the collision, she had signaled to the defendant to stop, as he was approaching her. Ingersoll also had testified that he was at the foot of the hill 150 feet away, and had signaled the defendant to stop. The point that appellant makes against the instruction is that the defendant was under no duty to stop upon a mere signal to stop, unless an apparent danger presented itself, and that it was, therefore, error in the trial court to instruct that a mere failure to obey the signal was negligence.

As an abstract proposition of law, the instruction is fairly

2. APPEAL AND
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tions.

subject to criticism at this point, and we do not approve of it as such. In its application, however, to the concrete case before us, it was quite pertinent to the evidence and we see no possible prejudice which could result therefrom to the defendant. If the jury found with the plaintiff that the signals were given, they must necessarily have found also that the apparent danger was present. If they did not find that the signals were given, then the instruction at this point would be entirely harmless to the defendant.

It appears from the testimony of the defendant's witnesses who, after the accident, examined the track left by defendant's car, that the car began to turn northwesterly at a point about 15 feet south of Briney's car, whereas the collision occurred at a considerable distance further north and about opposite the north end of Green's car. Furthermore, the real defense of fact under the evidence was that the plaintiff herself, suddenly and without warning, ran in front of the defendant's car, and was, therefore, guilty of contributory negligence. If the jury had found such to be the fact, then, under the instruction of the court, they must have defeated the plaintiff. The jury, therefore, necessarily found that the plaintiff did not so expose herself. Upon that view of the evidence, her apparent danger conclusively appeared at the time of the alleged signals. We think it clear, therefore, that the defendant suffered no prejudice from Instruction 10, even though it was technically erroneous at this point.

III. The plaintiff introduced certain testimony in rebuttal, to the effect that an automobile going up a sandy hill, such as described in the evidence, upon low gear at 6 or 8 miles to the hour, could be stopped almost instantly, and within a space of from 1 to 4 feet. This testimony was received, over appropriate objections by the defendant. Error is now assigned upon the admission of such testimony. The complaint is that it was an effort to establish a liability on the doctrine of last clear chance, and should have been introduced, if at

3. TRIAL: recep-
tion of evi-
dence: order of
proof: discre-
tion of court.

all, as a part of plaintiff's main case. It is also urged that the pleadings did not justify the establishment of liability on such ground. So far as the order of testimony is concerned, the discretion of the trial court was broad enough to permit the introduction of the evidence in rebuttal, even though it was properly a part of the main case.

As to whether defendant was liable upon the doctrine of last clear chance or not, it is sufficient to say that the plaintiff has not urged liability upon that ground. While the evidence received might have lent support to such a claim, it was also admissible on quite other grounds. The testimony in the main case on the part of plaintiff showed that, after the collision, the defendant's car had sped on for a distance of nearly 75 feet to the westerly side of the road. This circumstance tended to corroborate the plaintiff's testimony that defendant was traveling at a high rate of speed. The defendant testified to a very low rate of speed and a good control of his car on low gear. He also testified that, when he saw the plaintiff in front of his car, he stopped as quickly as he could, or at least that he was unable to stop sooner than he did. The later showing for the plaintiff, that his car could have been stopped within from 1 to 4 feet, if going on low gear at the rate testified to by defendant, tended to show improbability in his testimony in that regard. In other words, it tended to show that he must have been going faster than he testified.

We think there was no error in admitting the rebuttal testimony. The defendant appears to have had a fair trial. Considering the injuries of the plaintiff, the verdict of \$600 was very considerate. The judgment below must, therefore, be—*Affirmed*.

LADD, GAYNOR and SALINGER, JJ., concur.

STEVEN H. KLOPP, Appellant, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellee.

APPEAL AND ERROR: Review—Equity Cause—Deference to Opinion of Trial Court. The rule that due deference is given to the opinion of the trial court applies to the trial of an equity cause heard *de novo* on appeal, especially when the trial court makes a personal examination of the matter in controversy.

RAILROADS: Undercrossing—Reasonableness—Evidence. Grade crossings are the rule in this state. Evidence reviewed, and held to show that plaintiff's demand for an undercrossing was unreasonable, and therefore should be denied.

RAILROADS: Undercrossing—Excessive Cost—Materiality. A landowner is entitled to an "adequate" crossing, even though the cost be great, but the cost of an undercrossing is a circumstance proper to be taken into consideration with all the other circumstances of the case. So held where the cost of the undercrossing approximately equaled the value of the farm.

RAILROADS: Undercrossing—Failure to Furnish—Damages. Record reviewed and held insufficient on which to base a claim for damages for alleged failure to furnish a crossing.

COSTS: Apportionment—Mandamus. Record reviewed, in an action of mandamus to compel the construction of an underground crossing by a railway company, and held to be such that the cost should be apportioned. (Sec. 3854, Code, 1897.)

Appeal from Linn District Court.—MILO P. SMITH, Judge.

FRIDAY, APRIL 7, 1916.

THIS is an action of mandamus to compel the defendant to construct an undercrossing, so that the plaintiff may pass from his land on one side of the defendant's tracks to his land on the other. The question is: Was plaintiff entitled to an underground crossing, or was the grade crossing provided by the defendant an adequate crossing? Plaintiff also asked \$500 damages. The defendant resists the action on the ground of

its unreasonableness, the excessive cost, and the fact that the proposed crossing is not feasible; also on the ground that plaintiff has now an adequate crossing and one that will serve him better than the one proposed. The court found for the defendant, in part at least, but required defendant to move a small hill which obstructed the view of the track, and to make some other changes. There is a question, also, as to the taxation of costs, which were all taxed to the plaintiff.—*Modified and Affirmed.*

Rickel & Dennis, for appellant.

Cook, Hughes & Sutherland and *F. L. Anderson*, for appellee.

PRESTON, J.—1. A fact question is presented. It will be difficult to state the exact situation in the opinion. The case has been here before, and is reported in 156 Iowa 466.

On the former appeal, it was stated that, as the evidence then stood, it was doubtful whether plaintiff was entitled to the relief he asked. The cause was remanded and some additional testimony taken, but it does not change the case as presented before. After the case was remanded, it was stipulated that the testimony given before should be used and such additional testimony as either party might offer, and the case is presented in this court by using the abstract on the first appeal and attaching thereto another abstract presenting the new matter. A number of photographs were used on the trial, and the trial court made a personal examination of the crossing and the situation. The case was tried as in equity; and the rule so often stated is that we should and do give some weight to the opinion of the trial court; but, under the circumstances of this case, we ought, perhaps, to give it more weight, because the trial judge saw the situation as the witnesses attempted to describe it.

There is so much of the evidence, and it would serve no

1. APPEAL AND
ERROR: review:
equity cause:
deference to
opinion of trial
court.

useful purpose to set it out in detail, that we shall not attempt to do so, but shall state it in a general way, as best we can, with our conclusions. Plaintiff introduced

2. RAILROADS:
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ing: reason-
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dence.

evidence in support of the issue that his grade crossing in question was inadequate, because, as he claims:

1. It was too steep, and only half loads could be hauled up and over the crossing.

2. In wet and icy weather, it could not be used, because horses and cows would slip and fall.

3. It is dangerous to pass over the tracks either with loaded teams or driving cattle, for the reason that, as one is going up the hill from the north side of defendant's tracks to the south side, trains from the east cannot be seen until one is almost upon the tracks, and in going from south to north across the tracks, trains from the west cannot be seen, because of a sharp curve and cut, some 40 or 50 rods to the westward.

4. The gates were so arranged that a person might be trapped with his team and wagon and hit by a train while opening the same.

5. Because of the liability of teams and wagons to go straight from the north over the steep curve or embankment where the roadway makes a turn to go north toward plaintiff's land.

6. Because the crossing in question does not connect both portions of plaintiff's land, but, in order to reach his land on the north, the defendant built a portion of the roadway across the land of another.

The plaintiff himself gave testimony to sustain these different propositions, and introduced a number of other witnesses, all of which tended to sustain the plaintiff's claims; but we are of opinion that the weight of the testimony is with defendant. It is conceded by the defendant in open court that the place pointed out by the plaintiff is the cheapest place on plaintiff's land where an underground crossing could be built.

Perhaps we should have before stated some of the main facts in the case. Plaintiff claims he is the owner of land on either side of defendant's right of way; he has 29 acres north of the railway and 4 acres south. A part of the right of way was acquired from him in 1906. For many years, defendant had owned a right of way 100 feet in width, running through plaintiff's farm, on which its tracks were laid. The right of way and tracks at the place in question formed a pronounced curve, and were also upon a heavy grade. In 1906, defendant determined to straighten its track and reduce the curves and grade, and found it necessary to condemn a small wedge-shaped piece of land, belonging to plaintiff and containing 1.14 acres, north of the track. The right of way for all this distance through plaintiff's land is upon the north side of a steep hill, and plaintiff's land on the south side of the track is about 40 feet higher than on the north side. Defendant claimed that at no place could a crossing of any character be constructed at right angles or obliquely across the right of way without making a grade of more than 30 per cent. and so steep that it could not be in any manner traveled; that to construct an undercrossing where plaintiff desires one would cost more than \$8,000, and it would then be at an unreasonable grade; that, at the time defendant took possession of the land condemned, in 1906, it constructed for plaintiff an adequate crossing, and has since then kept it up, at the only place where a crossing could be constructed, having in view the reasonable use by plaintiff.

The trial court in its finding stated, among other things:

"The railroad was located across this land many years ago, and a grade crossing established, but, some 6 or 7 years ago, the defendant company, in straightening its line, condemned enough additional land for a double track, extending their ground northward, which necessitated a prolongation and some variations in the then existing crossing, and a crossing was accordingly constructed across both tracks and went to the east line of plaintiff's land and almost directly north of

the house and barn, the approach to which is the only feasible one from the south or from his buildings; but the plaintiff insists that this grade crossing is not adequate, and demands an underground crossing which would pass through the embankment several hundred feet westward from the present crossing, and then turn east along the right of way south of the track, terminating at or near the south end of the present crossing. The evidence shows that the north gate to the present crossing is about 30 feet from the north rail. It also shows that, to a person approaching the crossing from the south, the view of trains coming from the west is cut off by a mound of earth on the right of way and close to the south side of the track. These facts and the steepness of the grade of the north approach are the chief grounds of complaint that the plaintiff makes against the present crossing, and on which he makes his demand for an undercrossing, which would cost from \$5,000 to \$8,000, and for the purpose of enabling him to reach land worth about \$3,000. While the expense is not necessarily controlling in what constitutes an adequate crossing, we should not entirely lose sight of it, especially when it is as startling in amount as the record shows it would be in this case, where the expense would be, according to plaintiff's evidence, about equal to the entire value of the farm at the present time."

The court further says:

"Having personally viewed the premises, the court believes that, if the south gate to the present grade crossing were moved back to or near the south line of defendant's right of way, and the bank or small hill of dirt were moved sufficiently to enable a person approaching the track from the south to see approaching trains from the west, and the north gate moved back, say, 20 feet to or near the bottom of the grade, the plaintiff would have an adequate means of crossing, and that there could be no need of an undercrossing, so far as danger is concerned. I further find and believe from the evidence that a team that can haul a load from the railroad up to the plaintiff's house, and other buildings, can haul the

same load up the grade from his field to the railroad. The ascent is about the same on both parts of the road or lane. It seems that the plaintiff has used the present crossing ever since it was put in, and there is no showing that he has sustained any damage or injury in doing so, owing, no doubt, to his care and caution in crossing the track."

Here the court fails to find that the claims and demands set forth in plaintiff's petition and amendment are reasonable, and they are consequently denied. The decree did provide for making the changes suggested by the court, and it is stated by appellee that the changes have been made by it, at considerable expense.

On the first trial, plaintiff did not introduce any witnesses making an estimate of the expense in connection with the proposed underground crossing; but on the second trial, his engineer estimated the cost of the proposed crossing at about \$5,400, not including engineering and incidental expense. According to the testimony of defendant's engineer, the type of crossing proposed by plaintiff, or his engineer, was different from the standard crossing used by the defendant company and unsuitable for the purposes intended. Plaintiff did not figure on reinforced concrete. The defendant's engineer places the cost of an underground crossing, properly constructed, at about \$7,000 or \$8,000, or more.

3. RAILROADS:
under-cross-
ing: excessive
cost: material-
ity.

We think the weight of the evidence shows that the present crossing is no steeper than many highways. The alterations in the crossing required by the court obviate plaintiff's objection that the view of the crossing is obstructed. Considering all the circumstances, which we have not attempted to enumerate, our conclusion is that plaintiff's demand for an underground crossing is unreasonable, and we find, also, that, with the alterations required by the trial court, the present crossing is adequate.

There is no serious dispute between the parties as to the law of the case. Plaintiff contends that, if a party is entitled

to an adequate crossing, under Sec. 2022, Code Supp., 1913, then the cost of construction could not be pleaded as a defense, so as to defeat the owner's right to an adequate crossing. They say that the cost may be taken into consideration in determining the place where the crossing shall be placed, but that that question is not presented here. Plaintiff cites only the case of *Herrstrom v. Newton & N. W. R. Co.*, 129 Iowa 507, and cases therein cited, on the question of the cost. In that case, at page 512, we said, in regard to an overhead crossing:

"It is urged, however, that, as the cost of an overhead crossing will greatly exceed the benefits to be derived by the landowner, the defendant should not be required to furnish it. Undoubtedly, this should be taken into account in deciding upon the character and location of the crossing, but it is not a defense. The right of way is acquired upon the condition that an adequate crossing will be furnished the owner (*State v. Mason City & Ft. Dodge Ry.*, 85 Iowa 516), and this without reference to the cost involved. Such cost may be kept in view in determining the grade of the road and through what land it shall be located, but will not defeat the owner's right to an adequate crossing after his farm has been severed by the appropriation of the right of way, especially as the right to such crossing is conceded in estimating the compensation to which he is entitled. *Guinn v. Railway*, 125 Iowa 301. If, then, the grade crossing was impracticable as an adequate means of crossing from one portion of the farm to the other, as the jury found, it must be rejected, and the overhead crossing, conceded to be adequate, adopted in its stead, even though this may be at considerable expense to the railroad company."

As before stated, the question of cost is not controlling, and, under the authorities, is not a defense; still it is a circumstance properly to be considered, with the other facts in the case, and it has been held that, while convenience and profit to the landowner and expense to the company are proper to

be considered, neither, taken alone, is necessarily a ground for making or refusing an order like that requested. The question is whether the causeway, with proper gates and guard, is adequate. *State v. Burlington, C. R. & N. R. Co.*, 99 Iowa 565. In the same case, we said that, under the law, the landowner is entitled, not to the most convenient or profitable means of crossing, but to adequate means.

We have also held that the rule in this state is for a grade crossing, and it is only when it is unreasonable and inadequate that any other may be required. *Schrimer v. Chicago, M. & St. P. R. Co.*, 115 Iowa 35, at 42 and 43.

In regard to what constitutes an adequate crossing, we said, in *Truesdale v. Jensen*, 91 Iowa 312, at 314:

"The location and character of such a crossing must be determined with a due regard for all the interests involved in its construction and maintenance. Among these are the reasonable use which the landowner desires to make of it, its expense, and the effect it will have upon the operation of the railway and the safety of life and property. The landowner cannot dictate the kind of crossing he will have, nor the place where it shall be located."

This was cited and approved in the *Schrimer* case, *supra*, where it was said that neither the landowner nor the railroad company may act unreasonably or arbitrarily with reference thereto.

Without further discussion, it is our conclusion that the court rightly refused to grant plaintiff an underground crossing.

It should have been stated that, in the condemnation proceedings in 1906, the defendant company took from the plaintiff 1.14 acres of ground, which was not of great value, and yet plaintiff was paid for this strip \$500.

4. RAILROADS:
under-cross-
ing: failure to
furnish: dam-
ages.

On the former trial of this case, the jury allowed plaintiff \$1.00 damages. The evidence upon this appeal is not materially different at

this point from that on the former trial, and we agree with the trial court that the evidence did not warrant the allowance of damages.

2. The trial court taxed all the costs to the plaintiff. We think the costs should be apportioned. While the court refused to grant plaintiff an underground crossing, it did

order that, within 60 days, the defendant
 5. Coers: appor-
 tionment: man-
 damus. move the south gate at the present grade crossing back to or near the south line of its right of way, and cut down the hill or embankment that stood near the south rail of the south track sufficiently low to enable a person approaching the crossing from the south to see trains coming from the west at the point in the road beyond the plaintiff's west line, and to move the north gate back 20 feet, or to the bottom of the grade, as plaintiff may elect, and to so maintain the crossing in the future. This was done in order that the crossing might be an adequate one. The plaintiff was successful in his action to that extent. There is some difficulty in estimating just what proportion should be paid by each one. The question involved in the case, or the main question, was whether there was an adequate crossing, and this was involved in the whole case. Witnesses were introduced on the question of damages, and on this part of the case the defendant was successful, so that no part of the costs on the question of damages should be paid by the defendant.

Our conclusion is that the defendant should pay one third of the cost of both trials in the district court and in this court. As so modified, the judgment of the district court is—*Affirmed*.

EVANS, C. J., DEEMER and WEAVER, JJ., concur.

HATTIE LANZ et al., Appellees, v. A. C. SCHUMANN et al.,
 Appellants.

APPEAL AND ERROR: Waiver of Error—Acquiescing in Decision—
 1 Demurring Over. Filing a demurrer, after the overruling of a

motion to strike a substituted petition because a repetition of a former pleading already held bad on demurrer, works a waiver of any error in the ruling on the motion to strike, and presents a case where the substituted petition will be ruled on without reference to the original pleading.

COURTS: Rules of Decision—Law of Case—Right of Court to Reverse its Ruling. So long as a cause is before the trial court and undisposed of, the court may reverse its former ruling whenever convinced of its error. So held where the court first sustained a demurrer to the petition and later overruled a demurrer to a substituted petition, claimed to be a repetition of the first.

QUIETING TITLE: Oral Agreement to Sell—Consideration Delivered. Title will be quieted against one who orally agrees to sell his interest in lands, followed by the delivery by the purchaser of the consideration, as per contract.

EVIDENCE: "Parol Evidence" Rule—Non-Applicability to One Not Signing. The "parol evidence" rule is not applicable to one who does not sign the writing in question.

Appeal from Jasper District Court.—HENRY SILWOLD, Judge.

SATURDAY, NOVEMBER 27, 1915.

REHEARING DENIED FRIDAY, APRIL 7, 1916.

THE opinion sufficiently states the case.—*Affirmed.*

Bray, Shiflett & Wilkie, for appellants.

E. S. McLaughlin and *Ross R. Mowry*, for appellees.

WEAVER, J.—In their original petition, plaintiffs alleged themselves to be the owners in fee simple of certain described real property and that their title in part was acquired by purchase from the heirs of one Herman Lanz, deceased, one of whom was the defendant May Schumann, such purchase being made by written contract signed by said May Schumann and Rosa Stecher; but that by mistake, there was omitted from the contract words expressing an agreement by the sellers that their husbands should unite in the deed of conveyance.

They further alleged that defendant A. C. Schumann was present and orally agreed to join in executing a quitclaim deed to plaintiffs; that, relying thereon, plaintiffs made and delivered their promissory note for the agreed purchase price of \$3,100, and have in all respects kept and performed their part of the agreement. They further alleged that the defendant May Schumann did make a deed as promised, but that A. C. Schumann did not join therein and refuses to do so. Upon the grounds stated, the plaintiffs prayed that their title be quieted against the defendants and that the contract of sale be reformed to correct the alleged mistake. To this pleading, the defendant demurred generally, and the court sustained the demurrer. Plaintiffs thereupon filed an amended and substituted petition, restating practically all the matters contained in the first pleading, except the allegation of mistake in the written contract. It further alleges that plaintiffs purchased from defendants all their interest, vested and contingent, in the described land, and that defendants agreed to execute a quitclaim deed accordingly, and that A. C. Schumann was present, took part in and agreed to all the terms of said contract, which contract was oral, except as to that part thereof embraced in the writing mentioned in the original petition as having been signed by May Schumann and Rosa Stecher only, as grantors. It is further alleged that, in consideration of said agreement, plaintiffs made and delivered to defendants their promissory note for \$3,100, which note has been sold and transferred to a third party; but the defendant A. C. Schumann refuses to make a conveyance according to promise. Relief is again prayed that plaintiff's title be quieted and confirmed, and for other and general relief. Defendants moved to strike the substituted petition because it stated no other or different cause of action than was set up in the original petition, to which a demurrer had been sustained. The motion having been overruled, defendants demurred generally to the sufficiency of the petition. The demurrer was overruled, and defendants, refusing further

to plead, elected to stand upon their demurrer. Decree was then entered finding the truth of the allegations of the petition, and establishing, confirming and quieting the title to the land in the plaintiffs. Defendants appeal.

I. It is argued for appellants that the ruling upon the demurrer to the original petition became the law of the case, and it was therefore error for the trial court to permit the

substituted petition to stand and to overrule the demurrer thereto. For several sufficient reasons, the point is not well taken. In the first place, the defendants had once raised the question of the substantial identity of the substituted petition with the original petition, by their motion to strike. The court overruled the motion, thereby, in effect, holding that the second petition was not a mere repleading of the matter stated in the first. Defendants did not elect to stand upon the motion, but proceeded to demur. This was a waiver of the error, if any, in the court's ruling on the motion, and the demurrer served only to raise the question of the sufficiency of the substituted petition, without any reference to the original pleading or to the ruling upon the first demurrer.

Moreover, while the ruling on the first demurrer may have been the law of the case so long as it stood unchanged, the court did not by such ruling so tie its own hands or so exhaust its jurisdiction that, if it saw reason to change its own mind, it could not withdraw or change its holding and enter such ruling as, upon further reflection, it believed to be right, so long, at least, as the case was still before it and undetermined. There is nothing in *Long v. Furnas*, 130 Iowa 504, which is in any manner inconsistent with this holding.

II. Looking, then, to the sufficiency of the substituted petition, we have no hesitancy in holding that it states a cause

1. APPEAL AND ERROR: waiver of error: acquiescing in decision: demurring over.

2. COURTS: rules of decision: law of case: right of court to reverse its ruling.

of action. Its allegations, admitted by the demurrer, show that certain persons, including the defendant

3. QUIETING
TITLE: oral
agreement to
sell: consider-
ation delivered.

A. C. Schumann, agreed to quitclaim their interests in the land to plaintiffs for a specified consideration, and that the agreed con-

sideration was furnished. Stated otherwise, there was an oral agreement to the effect indicated, which agreement was reduced to writing with some of the grantors, but remained in parol with A. C. Schumann. Plaintiffs have performed their part, as have also the grantors signing the agreement, but A. C. Schumann refused to perform, on his part. Wholly irrespective of the question whether there was any mistake in the written agreement, or whether A. C. Schumann ever agreed to sign it, the case is clearly one in which the plaintiffs are entitled to equitable relief against him. If he was present, as the demurrer admits, taking part in the negotiations for the purchase, and agreed to the sale at the stated price, and plaintiffs, relying upon his conduct and his promises, made the settlement and turned over the agreed consideration, he cannot escape specific performance simply because his name is not subscribed with those of the other grantors to the written instrument. To thus hold him does not, as

4. EVIDENCE: "pa-
rol evidence"
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one not signing.

counsel seem to think, involve any departure from the rule which makes incompetent proof of oral agreements to vary or alter a written

contract. Mr. Schumann is not a party to the writing, and he cannot avail himself of its protection in this respect. It is only a party to a writing who can use it as a screen to shut out oral evidence of the actual agreement. It makes no difference what may be Schumann's relation to the land or to the other grantors, the petition, being taken as admitted, sufficiently shows (and his attitude in this case confirms it) that he was claiming some sort of an interest, contingent or otherwise, in the land in question; that he agreed to convey it for a consideration to be paid to some or to all the grantors; that the consideration has been delivered; and that he con-

tumaciously refuses to perform. But one conclusion can be drawn, and that is that plaintiffs are entitled to the relief granted.

The case of *Miller v. Morine*, 167 Iowa 287, on the subject of contract partly oral and partly in writing, has no application to the issues here presented. To sustain the decree below, it is not necessary to base it upon the theory that defendant A. C. Schumann was a party to a contract partly in writing and partly in parol. It is true there was a written contract, but it was not with him. So far as he is concerned, it was wholly oral, and by his demurrer, he admits it as alleged. The decree of the trial court is clearly equitable, and it is—*Affirmed.*

EVANS, C. J., DEEMER and PRESTON, JJ., concur.

JOHN D. MULLANEY, Appellee, v. E. W. CUTTING, Appellant.

EXECUTION: Sale—Manner, Conduct and Validity—Sale Without

- 1 **Redemption—Strict Compliance With Statute.** A sale of real estate on execution, *without the right of redemption*, demands an exceptionally strict compliance with the statutes. Certain irregularities reviewed, and held, *when taken in their entirety*, to invalidate the sale.

EXECUTION: Sale—Manner, Conduct and Validity—Sale en Masse

- 2 **Without Redemption—Inadequate Bid.** The fact that an execution sale of real estate is made *en masse* and on a grossly inadequate bid, *no right of redemption existing*, furnishes a persuasive reason for exacting a more strict compliance with the statutes governing such sales than is necessary where the right to redeem exists. (Sec. 3970, Code, 1897.)

PRINCIPLE APPLIED: The right to redeem had been lost. A farm of 280 acres, worth \$40,000 and encumbered, in its entirety, to the extent of \$17,000, was sold *en masse* on execution, on one bid for the amount of the judgment, \$1,056. No attempt was made to sell the land otherwise than *en masse*, nor did the defendant in execution propose any method of sale. The judgment defendant had other real estate worth \$3,500 above encumbrance, and subject to execution.

EXECUTION: Sale—Manner, Conduct and Validity—Inadequate

- 3 **Bid—Duty of Sheriff to Protect the Debtor.** A sheriff selling real estate on execution, *no right to redeem existing*, and receiving a bid known to be grossly inadequate, owes the duty to the execution defendant to adjourn the sale. (Sec. 4029, Code, 1897.)

EXECUTION: Sale—Manner, Conduct and Validity—Sale Without

- 4 **Redemption—Essentials of Notice.** Notice of sale of real estate on execution must distinctly state that such sale will be made *without the right of redemption*, when such is the fact. (Sec. 4023, 4024, Code, 1897.)

EXECUTION: Levy—Indorsement of Levy on Writ. It is essential

- 5 to a valid levy under execution that the sheriff enter *the fact of levy* upon the writ *when such levy is made*. The entry of such matters in the encumbrance book, or on the writ of execution at the time of making his final return after the sale, will not satisfy this requirement. (Sec. 3965, Code, 1897.)

Appeal from Winneshiek District Court.—A. N. HOBSON,
Judge.

WEDNESDAY, NOVEMBER 24, 1915.

REHEARING DENIED FRIDAY, APRIL 7, 1916.

ACTION in equity to set aside a sheriff's sale of real estate and the sheriff's deed executed pursuant thereto. There was a decree in the lower court for the plaintiff, and the defendant appeals.—*Affirmed*.

E. W. Cutting, for appellant.

Frank Sayre and *William S. Hart*, for appellee.

EVANS, C. J.—The sale in question was had upon general execution under a judgment against the plaintiff. The amount of the judgment, with interest and costs, was \$1,056. The land sold was a farm of 280 acres, worth from \$135 to \$150 an acre, and encumbered by mortgage to the extent of \$16,000 or \$17,000. The property was sold for the amount of the judgment, no other bid being received. The defendant was the attorney for the execution

1. **EXECUTION:**
sale: manner,
conduct and
validity: sale
without re-
demption:
strict compli-
ance with stat-
ute.

plaintiff, but made his bid in his own behalf. Upon the acceptance of his bid by the sheriff, he demanded and received a sheriff's deed, the property being not subject to redemption because an appeal had been prosecuted to the Supreme Court from the original judgment under which the execution was issued. Immediately upon the discovery that a deed had actually been issued under the sale, the plaintiff herein tendered to the defendant the full amount of his bid with interest and costs. The tender being refused, this action was brought.

The facts are not greatly in dispute. The question is whether the sale and the proceedings leading thereto were attended with such irregularities as to entitle plaintiff to equitable relief. The ground of the holding of the trial court does not appear in the record. Needless to say that the result of the sale was appalling. The plaintiff is at the disadvantage herein of having received notice of the time and place of the sale. What he evidently did not know was that the sale was not subject to redemption. The irregularities contended for are quite numerous. These are that the sale was irregular in that the tract was sold *en masse*; that the bid was inadequate; that the levy, if any, was excessive; that there was, in fact, no levy made before the sale; that, if there was a levy, it was only upon 120 acres of the land.

Section 3970, Code, 1897, is as follows:

"The officer shall in all cases select such property, and in such quantities, as will be likely to bring the exact amount required to be raised, as nearly as practicable, and, having made one levy, may at any time thereafter make others, if he finds it necessary. But no execution shall be a lien on personal property before the actual levy thereof."

2. Execution:
sale: manner,
conduct and
validity: sale
en masse with-
out redemp-
tion: inade-
quate bid.

There was no attempt in this case to sell the property in any other way than *en masse*.

Neither, on the other hand, was there any plan of division presented by the defendant before the sale. The fact that the property was all encumbered under one encumbrance is

an important consideration as bearing upon the propriety of a sale *en masse*. The same ought to be considered, also, as bearing upon the question of excessive levy. The execution defendant had other real property in the same county which was subject to execution. This consisted of a town property worth \$4,000 and encumbered for \$1,500. We have held heretofore that a sale *en masse* or a sale for an inadequate bid does not necessarily render the sale voidable. Our holding in that respect has been based in part upon the fact that the sales under consideration were subject to redemption.

In *Cooper v. Iowa Trust & Savings Bank*, 149 Iowa 336, 343, we said:

"The fact that the execution defendant has a large protection in his right of redemption for the period of one year from an execution sale of real estate usually furnishes the strong reason why such sale should not be set aside for a mere irregularity, which does not affect his substantial right."

The fact that the sale under consideration was *not* subject to redemption presents a reason why a more strict compliance with statutory provisions should be required than in cases where such right of redemption exists.

It must be said in this case that the levy was grossly excessive. In view of the encumbrance, however, it would have been difficult, if not impracticable, to make it otherwise, so far as this particular property was concerned. It was, however, within the power of the sheriff to protect the execution defendant against an unfair sale.

2. EXECUTION :
sale : manner,
conduct and
validity : inadequate bid : duty
of sheriff.

Section 4029, Code, 1897, is as follows:

"When there are no bidders, or when the amount offered is grossly inadequate, or when from any cause the sale is prevented from taking place on the day fixed, or the parties so agree, the officer may postpone the sale for not more than three days without being required to give any further notice thereof, which postponement shall be publicly announced at the time the sale was to have been made, but not more than

two such adjournments shall be made, except by agreement of the parties in writing and made a part of the return upon the execution."

In view of the fact that the sale was not subject to redemption, the amount of the bid was grossly inadequate. There were no other bidders present. The sheriff knew the land and believed it to be worth \$150 an acre at the time of such sale. Under the circumstances here shown, the duty of postponement was clearly upon him. It should be said for the sheriff that he did not himself know that the sale was not subject to redemption. In this connection, attention should be directed to the notice of sale. This was given in what was

called the "usual form." It is common knowledge that usually a proposed execution sale of real estate is subject to redemption. A sale not subject to redemption is somewhat exceptional. Because such proposed sale is subject to redemption, the attention and interest of general bidders are not attracted thereto. For the same

reason, parties desiring to buy property do not usually attend a sheriff's sale of real estate. The usual bidder, uncontested, is the execution creditor, and the usual bid is the amount to be made on the execution. In such a case, if the bid be inadequate or the levy excessive or the proceedings irregular, the irregularity can be equitably cured by the redemption. Sections 4023 and 4024, Code, 1897, provide for notice of execution sales. They do not provide for the exact form of such notice. Clearly, it is contemplated that such notice should show such proposed "sale." Our statute in terms contemplates two kinds of execution sales. One is the "sale absolute," as defined in Sections 4043 and 4045, Code. The other is the sale "subject to redemption," as defined in Code Section 4044. We think it was the very essence of the notice of sale in this case that it should have shown that the proposed sale in this case was to be absolute and not subject to redemption; and this is especially so, because, as already indicated, the usual

4. EXECUTION:
sale: manner,
conduct and
validity: sale
without re-
demption: es-
sentials of no-
tice.

execution sale of real estate is subject to redemption. If such fact had appeared in the notice involved herein, it would undoubtedly have avoided the unconscionable result which followed. If the public had been advised by this notice that a farm worth \$20,000 above its encumbrance was to be sold to the best bidder without redemption to satisfy a judgment of \$1,056, it is inconceivable that other and larger bids would not have been received.

There is a further irregularity in relation to the levy. The fact of levy was not endorsed upon the execution by the sheriff until it was included in his final return after the sale.

The act of the sheriff which is claimed to have constituted the levy was an entry in the encumbrance book. Such entry, however, omitted entirely 160 acres of the land which was included in the sheriff's deed. Section 3965, Code, 1897, requires all acts of the sheriff to be entered upon the execution at the time that the act is done. In a legal sense, there was no levy on the real estate, and could be none until such fact was entered upon the execution. The result is that the sale was actually had before a legal levy was actually made.

There is something to be said in censure of the execution defendant, the plaintiff herein, for his own dilatoriness and negligence. The execution plaintiff and his attorney exercised much patience for many months awaiting the performance of their debtor's promise to pay. The execution was carried by the sheriff for months, in an endeavor to be lenient toward the debtor. It appears from the record that he is a slow debtor, harassed on many sides by waiting creditors. Ben Franklin had such a debtor once, of whom he said:

"It is against his principle to pay interest and against his interest to pay the principal and therefore he pays neither."

It may be, therefore, that, if the statute had been followed in letter and spirit, the plaintiff would be in no fair position to ask the aid of equity. But we think that the irregu-

5. EXECUTION:
levy: indorse-
ment of levy
on writ.

larities noted, when taken in their entirety, furnish such a substantial departure from the letter and the spirit of the statute as to render the sale voidable. We therefore agree with the conclusion of the trial court, and the decree entered below will accordingly be affirmed.—*Affirmed.*

DEEMER, WEAVER and PRESTON, JJ., concur.

PEABODY BUGGY CO., Appellee, v. COOPER & COLLINS et al.,
Defendants, FIRST NATIONAL BANK, Garnishee, Appellant.

GARNISHMENT: Controverting Answer of Garnishee—Jury Question—Partnership Funds. Issue joined in a garnishment proceeding by the judgment plaintiff of a partnership, on the allegation that the garnishee had properly accounted for all partnership funds by the discharge of partnership obligations, presents a jury question.

Appeal from Crawford District Court.—M. E. HUTCHISON,
Judge.

MONDAY, NOVEMBER 22, 1915.

REHEARING DENIED FRIDAY, APRIL 7, 1916.

ACTION controverting the answers of a garnishee. Appeal from the action of the court in granting a new trial.—*Affirmed.*

H. L. Robertson and Roadifer & Roadifer, for appellant.

Sims & Kuehnle and Crary & Crary, for appellee.

GAYNOR, J.—On the 10th day of February, 1913, the plaintiff, Peabody Buggy Company, obtained judgment against the firm of Cooper & Collins and the individual members thereof, C. C. Cooper and T. D. Collins,

GARNISHMENT:
controverting
answer of gar-
nishee: jury
question: part-
nership funds.

for the sum of \$514.20, together with attorney's fees taxed at \$35.42, and costs.

On the 26th day of February, 1913, an execution was issued on this judgment against

the defendants, and under said execution a notice of garnishment was duly served upon the garnishee defendant herein, First National Bank of Woodbine. In pursuance of such notice, the said garnishee appeared, on the 31st day of March, 1913, and made answer by and through its cashier, George W. Coe. Said answer was taken before a commissioner agreed upon for that purpose. It was stipulated and agreed that the answer, when taken, should be filed in this cause, and was so filed. The plaintiff, not being satisfied with the answers so taken and filed in said cause, did, on the 7th day of April, 1913, file a pleading controverting the answer of the garnishee, as follows:

"Comes now the plaintiff, and, for its pleading controverting the answer of the garnishee filed herein, states that during the years 1910, 1911 and 1912 the defendants C. C. Cooper and T. D. Collins were engaged in business together at Charter Oak, Iowa, as a partnership, under the firm name and style of Cooper & Collins, keeping their partnership funds and transacting their banking business in the Farmers' State Bank at said place; that during the years 1910 and 1911 the defendant, T. D. Collins, wrongfully and fraudulently, without the knowledge or consent of his partner, the said C. C. Cooper, issued checks, under the firm name of Cooper & Collins, against funds on deposit in said Farmers' State Bank and sent the same to the First National Bank of Woodbine, Iowa, garnishee herein, which said bank received said checks and collected the amount of the same and appropriated the proceeds thereof to its own use and benefit and in discharging, in part, the individual indebtedness and account of the said T. D. Collins to said bank, said checks being in the following amounts and issued at the following dates, respectively: One for \$529.15, dated January 6, 1910; one for \$521.77, dated May 2, 1910; one for \$30, dated July 9, 1910; one for \$380.30, dated November 7, 1910; one for \$50, dated June 5, 1911; that such appropriation of the proceeds of said checks, and each of them, was in fraud of the rights and interests of the said firm

of Cooper & Collins, and of the defendant, C. C. Cooper, a member of said firm, and that by reason thereof the said garnishee is now indebted to the said firm of Cooper & Collins, after allowing the said garnishee for all just and proper credits of any nature whatever, in a sum in excess of \$1,000; that plaintiff denies that the proceeds of said checks or of either of them were applied by said garnishee upon any note or obligation of the defendant, C. C. Cooper, and denies each and every other matter set forth in the answer of said garnishee; that the firm of Cooper & Collins and the individual members thereof were insolvent at the time of the issuance of the checks in question, and ever since have been and still are insolvent with the knowledge of the garnishee herein."

To the pleadings so filed, the defendant garnishee appeared and filed answer, which, so far as material to this controversy, is as follows:

"Admits that during the years 1910, 1911 and 1912 the defendants, C. C. Cooper and T. D. Collins, were engaged in business together at Charter Oak, Iowa, as a partnership under the firm name of Cooper & Collins, keeping their funds and transacting their banking business in the Farmer's State Bank at Charter Oak. Admits that during the years 1910 and 1911 the said T. D. Collins issued certain checks, under the firm name of Cooper & Collins, drawn upon the funds of said Cooper & Collins on deposit in the Farmers' State Bank, and sent the same to the First National Bank of Woodbine, Iowa, garnishee defendant, and that said bank received said checks and collected the amount of the same; that said checks were of the date and of amount as set out in the pleading of the plaintiff controverting the answer of the garnishee defendant. Denies each and every other allegation contained in said pleading. Specifically denies that said checks were issued without the knowledge and consent of C. C. Cooper. Admits that during the time the said C. C. Cooper and T. D. Collins were so transacting business as such copartners under the firm name of Cooper & Collins, the said C. C. Cooper and T. D.

Collins executed their joint notes to the First National Bank of Woodbine, Iowa, for the following amounts: \$526.45, \$500 and \$50. That the said notes so executed were executed for the use and benefit of said copartnership, and the indebtedness represented by said notes was in truth and in fact an indebtedness of said copartnership. That the checks referred to the answer of the garnishee defendant, and set out in the pleading controverting said answer, were each applied in payment of the indebtedness of said copartnership, represented by the joint notes of the said C. C. Cooper and T. D. Collins. That during the time the said C. C. Cooper and T. D. Collins were so transacting business under the firm name of Cooper & Collins, the said T. D. Collins executed to the garnishee defendant his individual note in amount \$84.25; that said note so executed by the said T. D. Collins for the use and benefit of said copartnership and the indebtedness represented by said note, was in truth and in fact an indebtedness of said copartnership. That the check first referred to in garnishee defendant's answer and described in plaintiff's reply, controverting said answer, as dated May 2, 1910, amount \$30, was applied in payment of the indebtedness of said copartnership represented by said note to T. D. Collins. That during the time the said C. C. Cooper and T. D. Collins were transacting business under the firm name of Cooper & Collins, the said T. D. Collins executed to the garnishee defendant his individual note in amount \$721, signed by T. D. Collins and by E. R. Mattox and W. J. Chambers as sureties; that the said note so executed was executed for the use and benefit of said copartnership, and the indebtedness represented by said note was in truth and in fact an indebtedness of said copartnership; that the check referred to in garnishee defendant's answer as Exhibit 'B' and set out in plaintiff's reply controverting said answer, was applied in payment of said indebtedness of said copartnership represented by said note. That during the years 1910 and 1911, the checks described in the answer of garnishee defendant and set out in plaintiff's pleading controverting said

answer were issued and delivered to garnishee defendant to be used in payment of certain notes held by garnishee defendant, which notes were signed by C. C. Cooper and T. D. Collins, sole members of said copartnership, and also in payment of certain notes held by said garnishee defendant signed by T. D. Collins, and T. D. Collins, E. R. Mattox and W. J. Chambers."

The garnishee further pleads that it received said checks and applied the proceeds thereof in the payment of said notes.

The balance of defendant's answer is the pleading of affirmative matter upon which garnishee predicates an estoppel, and further matter upon which it predicates a claim that plaintiff cannot maintain this action in the form in which it is presented, challenging also the jurisdiction of the court to herein determine the issue.

At the conclusion of plaintiff's testimony, the court, on the motion of garnishee, directed the jury to return a verdict for the garnishee, which was accordingly done. Thereafter, on the 24th day of November, 1913, the plaintiff filed a motion to vacate and set aside the order and judgment of the court withdrawing the case from the jury, and discharging the garnishee. On the 28th day of November, 1913, the court sustained the motion to set aside the order directing the jury to return a verdict for garnishee and the order discharging garnishee, and ordered a new trial of the cause. From this last order, the garnishee appeals.

In the view that we take of this case and of the issues tendered, it is not necessary for us to consider many of the matters urged by appellant in argument. It appears that, by consent of all parties, the answers of the garnishee, in response to the notice of garnishment, were taken and filed in the cause. These answers tended to disclose just what is contended for by the garnishee in its answer to the pleading controverting the answer of the garnishee, to wit, that Cooper and Collins were a partnership and had certain funds deposited in the name of the partnership in the Farmers' State Bank at Charter Oak; that T. D. Collins, a member of the

firm, drew checks upon this fund in favor of the garnishee defendant; that these checks were signed by him in the name of the partnership; that they were delivered to the First National Bank of Woodbine and by it cashed; or, in other words, the First National Bank, on these checks so signed, withdrew from the Farmers' State Bank the funds there on deposit in the name of the partnership and belonging to the partnership, the checks being as follows: One for \$529.15, dated January 6, 1910; one for \$521.77, dated May 2, 1910; one for \$30, dated July 9, 1910; one for \$380.30, dated November 7, 1910; one for \$50, dated June 5, 1911, making a total amount drawn by these checks from the copartnership account at the Farmers' State Bank of \$1,510.92. The garnishee bank, in accounting for this fund so received, claimed that, during the time that the copartnership existed, the partners executed their joint notes to the defendant garnishee for the following sums: \$526.45, \$500 and \$50; that T. D. Collins executed to the garnishee defendant his individual note for \$84.25; that the proceeds of these checks were used in discharging this indebtedness. The indebtedness claimed to have been represented by these notes, as before set out, amounted to \$1,160.70. This is the way the garnishee undertook to account for the amount so received upon these checks. If this was all that the bank had against the firm upon which these checks could be applied, then there would be a balance in the hands of the garnishee bank, unaccounted for, realized from the proceeds of these checks, of \$350.92.

The garnishee, however, claimed that it had disposed of all the proceeds of the checks in satisfaction of the indebtedness owed to it from either Collins and Cooper as a firm, or from T. D. Collins, and pleaded, in addition to the matters hereinbefore set out, that T. D. Collins executed to the garnishee his individual note in the amount of \$721, signed by T. D. Collins and E. R. Mattox and W. J. Chambers as sureties, claiming that this note, with all the other notes, was executed for the use and benefit of the copartnership, and

that the indebtedness represented by the notes was, in truth and in fact, the indebtedness of the copartnership. If the garnishee's contention is true, then the total amount of notes held by the garnishee against the firm, or against T. D. Collins, would amount to about \$1,881; and if garnishee's contention is true, there would be nothing due to the partnership on account of the checks so delivered to it by T. D. Collins.

At the conclusion of the testimony, the court, assuming that this \$721 was actually paid by the defendant garnishee out of the proceeds of the checks, directed a verdict for the garnishee. Thereafter, the court, its attention being called to the testimony of Collins, given upon the trial, that the amount represented by the note of \$721 had been reduced to judgment and the judgment paid, not by the garnishee out of the proceeds of the checks, but by the sureties on the note, E. R. Mattox and W. J. Chambers, concluded that there was a question of fact as to what disposition was made, or as to how this \$721 was, in fact, paid; whether it was paid by the bank out of the proceeds of these checks, as claimed by the bank, or whether it was paid by the sureties of the note out of their individual funds. The court thereupon concluded that there was a jury question as to this fact, and sustained the motion setting aside his former order discharging the garnishee, and ordered a new trial.

There is no dispute in this record as to the amount received by the garnishee upon these checks drawn by T. D. Collins in the firm name. There is no dispute that the funds upon which these checks were drawn belonged to the firm. There is no question that the garnishee received the proceeds of these checks. The garnishee has undertaken to account for the disposition made of the money so received. So far as this record at present shows, there is no controversy as to the disposition made of the proceeds of these checks, except that involved in the claim of the garnishee that it paid out of the proceeds of the checks the note of \$721, signed by T. D. Collins, and E. R. Mattox and W. J. Chambers as sureties. If

they actually paid this out of the funds received from these checks, then on its contention it has paid out the full amount of the checks on obligations, either of the firm or of members of the firm; but, if it did not pay this \$721 out of the funds created by these checks, then there would be at least \$1,000 of the funds, and perhaps something more, still in their hands unaccounted for. The fund upon which these checks were drawn belonged to the partnership. Whatever proceeds remained in the hands of the garnishee bank, after satisfying all legal obligations, belonged to the copartnership. The judgment was against the copartnership, and the copartnership could have maintained an action to recover these funds on demand. The garnishee after garnishment had the same right as its creditors would have to the funds; no better, of course, but no worse.

We cannot accept the appellant's construction of the pleading controverting the answers of the garnishee. When, by agreement, the answers of the garnishee were taken, if those answers had disclosed an indebtedness from the garnishee to the execution defendant, the plaintiff, on motion, could have had the funds, so shown to be in the hands of the garnishee, condemned to the payment of his claim. If the answers of the garnishee disclosed no indebtedness, and no pleading was filed controverting the answers, the garnishee could have been discharged upon motion, and could base his discharge upon the answers made. When the plaintiff became dissatisfied with the answers of the garnishee, he had a right, under the statute, to controvert those answers. To controvert is to deny. A pleading which by fair construction denies the truth of the answers made by the garnishee puts the answers in issue.

The pleading in this case, in express terms, denies the answers of the garnishee. The answers of the garnishee disclosed that the funds received by it, through these checks, were received through checks drawn upon the execution defendant's account in the bank at Charter Oak by one of the partners. The garnishee undertook to account for the dispo-

sition of this fund, and if its answers were not controverted, we assume that the court would have followed its original lead and directed that the garnishee be discharged. The plaintiff, in his pleading controverting the answers, alleged that the sum so received by the garnishee upon the checks aforesaid was not only received by the bank, but that the bank had used a portion of it in discharging the individual indebtedness of T. D. Collins; that it had appropriated the balance to its own use; that, on account of the matters so pleaded, the garnishee was indebted to the firm of Cooper & Collins (after allowing the said garnishee all just and proper credits of any nature whatever) in a sum in excess of \$1,000; and plaintiff further denied in his pleading controverting the answers of the garnishee that the proceeds of such checks were applied by said garnishee upon any note or obligation of the defendant, C. C. Cooper, and denied each and every other matter set forth in the answer of the garnishee. This was a clear and explicit pleading controverting the answers of the garnishee, and putting the answers of the garnishee in issue. The garnishee had assumed in its answers and in its pleading to account for this fund. It admitted its receipt and undertook to show affirmatively what disposition had been made of it. There was but one question before the court at the time that it sustained the motion setting aside the order discharging the garnishee, to wit: Is there a question of fact for the determination of the jury whether the whole fund received by the garnishee bank has been appropriated by it to the payment of claims held by it against Cooper & Collins or the individual members, and is any of that fund left in the hands of the bank for which it should be required to account to the firm of Cooper & Collins? If there was, in fact, any portion of that fund left in garnishee bank's hands, unappropriated, which belonged to the firm of Cooper & Collins, plaintiff reached it by the garnishment proceedings. The court simply held that there was a question of fact upon

that issue that should have gone to the jury for its determination, and therefore reversed its action discharging the garnishee. This construction of the pleading and of the action of the court precludes us from considering many questions urged by counsel for appellant.

We find no reversible error in the action of the court, and the cause is—*Affirmed*.

DEEMER, LADD and SALINGER, JJ., concur.

FRED PLANTZ, Appellee, v. KREUTZER & WASEM et al.,
Appellants.

MASTER AND SERVANT: Assumption of Risk—Dangerous Places

1 —Knowledge of Servant—Dangerous Methods of Work.

(a) Deliberately choosing a dangerous rather than a safe method of performing work, with resulting injury to the servant, presents a case of both (1) assumption of risk and (2) contributory negligence. In such case, the servant's negligence becomes the proximate cause of the injury.

(b) The servant assumes the risk of all dangers against which he may protect himself by the exercise of ordinary observation and care.

(c) An employee assumes, as an incident of his service, any risk which arises from the permanent, visible and understood conditions of his master's plant.

(d) Recovery cannot be had when the servant voluntarily exposes himself to known and appreciated danger, or to a danger which he ought to know and appreciate by the exercise of ordinary care.

(e) It is not negligence to expose a servant to any danger which is obvious to, and understood and appreciated by, the servant.

PRINCIPLE APPLIED: A lumber shed, with driveway, had a south door 16 feet, and a north door 8½ feet high. Plaintiff, a man of mature years, had worked for the defendant 8½ days in hauling lumber, using defendant's team. With a full knowledge of the height of the doors, plaintiff, standing on top of a load of lumber, the top of which he knew was at least 5½ feet from the ground, drove the team himself through the south door and along the driveway, and stopped the horses with their heads under the north doorway, intending to take on other articles and then drive out through the north door. He wound the lines around a stake on the wagon, and among other articles then loaded was a box of glass, which defendants' foreman directed him to hold upright. Plaintiff was

practically six feet tall. Plaintiff held or steadied the box of glass with his left hand, and, without adjusting his body so it would miss the top of the door, reached for and unwound the lines. The team started instantly in consequence thereof, and, the team not stopping in response to plaintiff's cry of "Whoa," plaintiff was hit by the upper part of the door and injured. The team was not in the habit of starting without a suggestion from the driver. The sole negligence assigned was in furnishing plaintiff an insufficient doorway through which to drive. *Held*, plaintiff could not recover because (a) he assumed the risk incident to his position on the load,—the risk that the horses might start,—and (b) he was guilty of contributory negligence—this negligence being the proximate cause of the injury.

TRIAL: Instructions—Applicability—Speculation on Facts Without Evidence. An instruction is manifestly erroneous which turns the jury loose in the zone of mere speculation and permits them to find the existence of facts, (a) without evidence and (b) in flat contradiction to the only rational inference which the testimony will bear.

PRINCIPLE APPLIED: (Additional to No. 1.) The only rational inference possible under the testimony was that the horses started *solely* from the voluntary act of the plaintiff in unwinding the lines, with consequent suggestion to the horses to start. But the court, *inter alia*, instructed:

"If, after the load on the wagon had been completed, and *while the plaintiff was attempting to take the lines in his hands for the purpose of controlling the team*, and before he had an opportunity so to do and determine how he would attempt to pass through said opening, and before he had opportunity to take necessary precaution for his own safety in so doing, the team suddenly *and without word or sign from the plaintiff and without his voluntary action or conduct*, passed rapidly forward and through such doorway and plaintiff was thereby struck and thrown from such load and injured, plaintiff would not be guilty of contributory negligence," etc.

Appeal from Marshall District Court.—CLARENCE NICHOLS, Judge.

SATURDAY, NOVEMBER 20, 1915.

REHEARING DENIED FRIDAY, APRIL 7, 1916.

ACTION for personal injuries. Opinion states the facts. Judgment for the plaintiff. Defendant appeals.—*Reversed*.

C. H. Van Law, for appellants.

Carney & Carney, for appellee.

GAYNOR, J.—This is an action to recover damages for personal injuries. On or about the 8th day of August, 1912, plaintiff was employed by the defendants as a teamster in defendants' lumberyard, and was so employed for several days prior to receiving his injuries. On this particular day, he drove down into defendants' yards and took on a load of plank, and then was directed to drive into the shed to get some mop boards. He drove in the south door of the shed and proceeded northward through an alleyway, in the shed, to the north door, and stopped with his horses' heads right at or under the north door. Wilson, defendants' foreman, was with him at the time. Wilson went up a little ladder on one side of the alleyway and got the mop boards. The shed is about 60 feet long. The south door through which plaintiff entered is about 16 feet high. The north door is 8½ feet high. There is lumber piled on either side of the shed. When he reached the north door, Wilson said to him: "Wait here, and I will get the mop boards." He got the mop boards and handed them to the plaintiff, who was then standing on the top of the loaded wagon. Wilson then directed him to wait a bit and said: "I will get a box of glass." Wilson got the box of glass and handed it to him, and said: "You want to hold the box of glass up." He set the box of glass on top of the loaded wagon. As he set the box of glass down in front of him, he held it with his left hand and reached over with the other hand to gather up the lines which were tied around a stake, or, as he described it, "off the deck or stake." Just as he reached over for the lines and grabbed them off the stake, the team started. Plaintiff hollered "Whoa!" but the horses continued, and he came in contact with the upper part of the doorway and was knocked off and hurt.

Plaintiff's testimony is that, after he had received the mop boards and placed them on the loaded wagon, and Wilson

had handed him the box of glass with directions to hold the glass up, he bent forward, reached for the lines, and grabbed them off the deck, or stake, and the team started. He says: "I just got hold of the lines when they started, all at once." The top of the north door, through which plaintiff attempted to pass, was $8\frac{1}{2}$ feet from the ground. The top of the loaded wagon upon which he was at the time was $5\frac{1}{2}$ or 6 feet from the ground. Plaintiff was 5 feet 10 inches tall. The height of the box of glass is not shown. Plaintiff's contention is that the horses started without any command from him to do so—started as soon as he grabbed the lines. Plaintiff received severe injuries. He charged the defendants with negligence. The acts, or omissions to act, which he charges constitute actionable negligence and the acts, or omissions to act, upon which he predicates his right to recover as for negligence, are stated in his petition as follows:

(1) Defendants were negligent in providing an unmanageable team for plaintiff with which to carry on his work; (2) defendants were negligent in providing an unsafe place in which to work, in reference to the situation of the lumber piles, alleyways, etc., and in that the doorway was so unreasonably low that plaintiff could not safely drive from said building on top of said load, and escape contact therewith, under the facts and circumstances as outlined in this petition; (3) defendants were negligent in failing to warn said plaintiff of his danger on the particular day in question, and in reference to the particular instance herein described; (4) defendants were negligent in failing to warn plaintiff of the danger in handling and managing said team; (5) defendants were negligent in so constructing their lumber shed and exit therefrom on the steep incline that the danger from contact with the top of said door was greatly increased.

At the conclusion of all the testimony, the defendants moved the court to direct a verdict for the defendants on the following grounds:

(1) Because there is no testimony in the case to sustain

a verdict in favor of the plaintiff; (2) because the undisputed testimony shows that the plaintiff is guilty of such contributory negligence as to relieve the defendants of any liability; (3) because there is no proof showing that the defendants were guilty of any negligence rendering them liable; (4) because the undisputed evidence shows that the injury suffered by the plaintiff was due to the fact, or claimed fact, that the team started without any direction or command from the plaintiff, and that, by reason thereof, the plaintiff was taken unawares in going through the door or gate; and the undisputed evidence shows that the defendants did not know and were never advised, at any time, that the team which plaintiff was driving would start to move forward with a load without a command or direction or some effort on the part of the driver to start them; that, if the plaintiff was injured by reason of the starting of such team, or habit of such team to start without command or direction, such fact was not known to the defendants, and they were not in a position, nor were they required, to advise the plaintiff, or caution against any such hazard or danger; that any injury sustained by the plaintiff, by reason of the starting of the team without command or direction of the driver, was among the risks assumed by the plaintiff.

This motion was by the court overruled. The court, however, in the submission of the case to the jury, withdrew from their consideration, as a basis of negligence, the first, third and fourth specifications of negligence, and submitted to the jury only the second and fifth, saying to the jury:

"The claimed negligence relied upon by the plaintiff herein, and the only claimed negligence which the court submits to you for your consideration, is as follows: 'In providing the plaintiff an unsafe place in which to work, in that the doorway at the north end of the driveway, through the lumber shed, was so low as to be unsafe for the use of plaintiff as a teamster.'"

It was on this specification of negligence that the cause

was submitted to and determined by the jury, and upon this specification, under the proof offered, the jury returned a verdict holding the defendants guilty of negligence, and the plaintiff free from any negligence contributing to his injuries. In its fourth instruction to the jury, the court said:

"The question for you to consider is whether the plaintiff has established by a preponderance of the evidence that the place in which he was required to work was not reasonably safe for him to use in performing his work as a teamster on account of the doorway on the north end of the driveway being of insufficient height."

And it thereupon directed the jury, in determining this question, to consider the height of the doorway, the arrangement of the lumber shed, its necessity for use by plaintiff, both with and without loads, the height of the loads likely to pass through the same, and any other fact or circumstance bearing upon the question, and said:

"If therefrom you find . . . that such doorway was so low as to render the place unsafe for plaintiff's use as a teamster, and that such insufficient condition was due to a failure on the part of defendants to exercise ordinary care in respect thereto, then the plaintiff has established negligence on the part of the defendants in failing to furnish him with a reasonably safe place in which to perform his work," provided they found that this negligence was the proximate cause of the injury.

From the foregoing, it is apparent that this cause was submitted to the jury and determined upon the theory, first, that the defendants are negligent, if negligent at all, in that they provided for the use of the plaintiff as their teamster, this north doorway, with its opening but 8½ feet in height, and left it to the jury to say that, as a matter of fact, the defendants were negligent in furnishing for the plaintiff an opening through which to pass, of 8½ feet in height. To find the defendants guilty of actionable negligence, the jury must have affirmatively found that the defendants were negligent

in maintaining the doorway at that height, and that this negligence was actionable, and the proximate cause of the injury.

There was no dispute as to the height of the doorway. There was no dispute that the plaintiff approached it from the south; that he stopped his horses with their heads under or at this opening. There is no dispute as to the height of the load on which plaintiff was standing. There is no dispute as to the purpose for which the plaintiff went there, or as to what he was doing, or that he intended, after he completed the load, to pass out through this doorway. The only question submitted to the jury as a basis for recovery, so far as the negligence of the defendants is concerned, was the fact that this doorway was but 8 feet 6 inches high. It is apparent that, as plaintiff approached this doorway, it was in plain view. That he knew approximately the height of this doorway is not in dispute. While upon the witness stand he testifies that the doorway through which he attempted to pass was about 8 feet high. He gives also the width of the door, approximately as the undisputed evidence shows it to be. These observations must have been made before or at the time that he attempted to pass through it, for he says that he never visited the place after the injury; that he never made any observations of it after the injury. His estimates, therefore, must be based upon knowledge acquired before or at the time of the injury. He drove within a few feet of the opening and stopped.

The court withdrew from the consideration of the jury any negligence based upon the character of the team furnished plaintiff for use; withdrew from the jury's consideration any negligence predicated on the claim that plaintiff was not warned of the character of the team, or of the dangers attending an effort to pass through the opening. The door had been there for many years before this injury, and had been used by the defendants in the transaction of their business. It was a permanent structure, plainly perceivable by anyone who

attempted to use the door. When he drove up to this door with this loaded wagon, the fact that there was a space of only 3 or 3½ feet above the load to the top of the driveway was just as apparent to him as it was to the defendants, or to any other employee of the company. It was apparent that he could not pass through that opening, upon that load of lumber upon which he was at the time, without adjusting himself to the conditions that confronted him. He knew, or, by the exercise of ordinary thoughtfulness should have known, that if he attempted to pass through that doorway, without adjusting himself to the conditions there apparent and open to him, he must of necessity come in contact with the top of that doorway. He stopped there, wound his lines around the deck or stake, and proceeded to finish his load. After he had finished it, he reached for the lines, grabbed them, and the horses started. That the horses might start under those conditions was just as apparent to him as to the defendants or any of their employees. That, if they did start before he was adjusted in his position to the conditions that confronted him, he would be brushed off the load, was just as apparent to him as to the defendants or any of their employees.

Did he assume the risk incident to his position, with a knowledge of all the facts out of which the peril arose—the risk that the horses might start under those circumstances,

- and that injury would be inevitable? This, we think, is the pivotal question in this case. Answered in the negative, the verdict must stand; answered in the affirmative, the case must be reversed. We answer in the affirmative for the following reasons:
1. MASTER AND SERVANT: assumption of risk: dangerous places: knowledge of servant: dangerous methods of work.

If the doorway was too low to permit the plaintiff to pass through or under without adjusting himself to the conditions, this fact was known to him. The team attached to the load was in his possession and subject to his control. The sudden starting of the team involved the master in no negligence, nor can negligence be predicated on the thought that

the master, by the exercise of reasonable care, might have known that the team would start without command and before the plaintiff could adjust himself to the conditions.

We must assume that it was the intention of the plaintiff at the time that he reached for the lines, to adjust his body to the conditions there apparent, and, by so adjusting his body, avoid injury. We must assume that it was his intention to control the horses and adjust himself to the *apparent* conditions before the horses started, and so pass out under this doorway in safety. That, if the horses had not suddenly started, he would have done this, is also apparent. That he did not have time to adjust himself is not chargeable to any fault of the master. That he did not adjust himself is due to the fact that, with the danger of proceeding through the doorway in an upright position, he grabbed for the lines before assuming an attitude of safety.

The horses did not start until he grabbed the lines. Why the horses started cannot in this record be traceable to any act, except the act of the plaintiff in grabbing the lines. They were not told to go by anyone. They had been standing at this point for some time and had not attempted to move until plaintiff grabbed the lines from the deck or stake. The plaintiff then, without adjusting his body to the conditions which he says rendered the passage under this doorway unsafe, grabbed the lines and the horses started, and he was injured. It was his intention to pass out through this doorway, knowing the exact conditions under which he must pass. He failed to control the action of the team under his control or given to his control, and failed to adjust his body to the dangers apparent. That the horses were not controlled before he had adjusted his body to the situation was not the fault of the master. That the act of grabbing the lines might suggest to the horses that he desired them to proceed forward was as apparent to him as it was to the master. The only act to which the sudden movement of the horses can be traceable is the act of the plaintiff in grabbing the lines.

Even where the master is negligent, where he has, in fact, done the thing, or omitted to do the thing, charged as negligence, and the servant knows this, and knows that, under certain conditions, or in pursuing a line of conduct, he will receive injury, and the agencies out of which the peril arises are under his control, or within his control, and not within the control of the master, and, notwithstanding this, he creates the conditions, or pursues the line of conduct out of which the peril arises, and the injury is due, not alone to the act of the master charged, but to the act of the servant in creating the conditions or pursuing the conduct which, with or without the act of the master, is the immediate, contributing cause of the injury, the servant cannot recover.

Where the act, or the omission to act, upon which negligence is predicated, is known to the servant, and, as a reasonably prudent man, he knows, or by the exercise of reasonable care should know, that the master's act or omission to act involves perils to the servant, and that a certain line of conduct on his part is prudently necessary to avoid injury, and that by pursuing a certain line of conduct open to him he can avoid injury from the negligence of the master, a failure to exercise that care involves the servant in such negligence that the master's negligence becomes the remote, and the servant's negligence, the immediate and proximate cause of the injury; and when he pursues such a line of conduct, with a knowledge of the master's derelictions, he assumes the risk attendant upon the master's wrong. Or, in other words, if the master is negligent and the servant knows this, or knows all the facts upon which the master's negligence is predicated, and, as a reasonably prudent man, knows, or ought to know, that danger to himself lies in a certain line of conduct, and another safe way is open to him, which as a reasonably prudent man he can see and appreciate, and he pursues the line or course that involves him in danger from the master's negligence, and fails to pursue the line of conduct open to him which would avoid peril from the master's negligence, then, as a matter

of law, his act, or failure to act, becomes the proximate and immediate cause of the injury, and the master's, the remote, and by so doing he assumes the risk or waives the master's negligence. Or, putting the thought still another way, where one knows and appreciates danger to himself, by reason of conditions that confront him, which are open and known to him, and knows that to pursue a certain line of conduct involves him in peril because of the conditions, and there is another line of conduct open to him which involves no risk from the conditions upon which the master's negligence is predicated, and he assumes to pursue the line which involves the risk, his negligence in so doing become the immediate and proximate cause of his injury, and he assumes the risks incident to his conduct.

In the case at bar, the defendants could not have told the plaintiff anything as to the situation, as to the location and construction of the doorway and the danger to him, in the event that the team started while he was standing upon the load, that he might not reasonably be expected to have known as well as the master. He was a man of mature years and had been driving this team for 8½ days prior to the injury. He knew the height of his load; he knew the height of the doorway; he knew that, if the team started while he was in an upright position, he could not pass under that doorway in safety. He must have understood, and therefore appreciated, the fact that it was necessary for him to adjust his position, in view of the load and the height of the door above the load, before starting the team. Without doing this, however, as he says, he grabbed for the lines and the horses started. There is no evidence that the horses started from any other cause than the act of the plaintiff. That they started from any other cause, in view of the whole record in this case, is a mere matter of speculation and surmise, and based upon no tangible evidence. The court withdrew from the consideration of the jury any charge of negligence based on alleged vice in this team. In the face of this record, the fact seems to be conclusively

established that this team was never known to start except on suggestion from the driver that they should start. The only evidence to the contrary is the testimony of Hausafus, who said, "This Tim horse had the habit of jumping when he started;" but confines this statement to the fact that this occurred when this horse was driven single. He said that this occurred when he was teaming. He said that, when he was teaming, he drove this Tim horse single. There is no evidence that this team, as then constituted, was ever known to start without command. The evidence is that this team never did start without command, or something to indicate that it was desired that they should start.

On the question of plaintiff's contributory negligence, the court in its instructions to the jury recited the facts, which were undisputed in the evidence, touching the height of the doorway, the height of the load, the place where the horses were standing, and said:

2. TRIAL: instructions: applicability: speculation on facts without evidence.

"Such being the situation, if the plaintiff deliberately started the team forward and undertook to pass through the doorway in a

standing posture, and was struck by the top of the doorway and thrown from the loaded wagon and injured, he would be guilty of contributory negligence as a matter of law; but if, after the load on the wagon had been completed, and *while the plaintiff was attempting to take the lines in his hands for the purpose of controlling the team*, and before he had an opportunity so to do and determine how he would attempt to pass through said opening, and before he had an opportunity to take necessary precautions for his own safety in so doing, the team suddenly and *without word or sign* from the plaintiff and *without his voluntary action or conduct*, passed rapidly forward and through such doorway, and the plaintiff was struck and thrown from such load and injured, plaintiff would not be guilty of contributory negligence, provided you believe that he could have passed safely through such opening on the top of the load, had he secured control of the team and had

an opportunity to determine the best method of passing through such doorway on the top of such load, and provided you believe and find that the plaintiff, as an ordinarily careful and prudent man, believed there was no danger that such team would start unbidden up through such door," thus leaving the jury to speculate, and by speculation find a fact to excuse plaintiff's conduct, without any evidence to support the fact. Under the instructions, the jury was permitted to find that a fact existed that excused the conduct of the plaintiff and exonerated him from the charge of negligence, without evidence of the fact. In fact, the finding, if made as suggested by the instruction, would be contrary to and against the plaintiff's own testimony as to just what he did immediately preceding the forward movement of the horses. His testimony is, speaking of the box of glass:

"I set it down in front of me; held it with my left hand and reached over with my other hand and the team started. I got the lines off the stake and the horses started. I reached for the lines and grabbed them off the stake and the team started. I just got hold of them and they started all at once."

Juries cannot be permitted to speculate as to the existence or nonexistence of material facts. They cannot be permitted to rest their finding upon mere surmise or speculation. There must be a basis in the evidence before the jury can be permitted to say that a fact exists. Under this record, the team had not started, had indicated no purpose to start, until the plaintiff reached over and grabbed the lines off the stake. The only rational inference from his testimony is that, after he got his load completed, he went forward or reached forward, grabbed the lines off the stake about which they had been wound, and the horses started, and the jury was permitted to say in the face of this evidence that the team suddenly started, without word or sign from the plaintiff and without his voluntary act or conduct.

Thus we see that the conditions there warned the plaintiff that he could not pass through this door in an upright

position; that it was necessary to adjust his body to the conditions before the horses started; that he knew that, by adjusting himself to the conditions there, he could pass through under this door in safety. It was his intention to pass through this door, yet, without adjusting himself, he reached forward and grabbed the lines and the horses started. The horses clearly were started by the voluntary act and conduct of the plaintiff, and started at a time when he, as a reasonably prudent man, knew that he was in a position of peril; that he could not pass through under the door in that position; that it was necessary to adjust himself on the load to the conditions, before attempting to pass through, and this he did not do.

We are satisfied that the record in this case does not support a verdict for the plaintiff. We are satisfied that the court should have sustained defendants' motion for an instructed verdict. As supporting the propositions herein stated, see *McCarthy v. Mulgrew*, 107 Iowa 76; *Sorenson, Admr., v. Menasha Paper & Pulp Co.*, 56 Wis. 338 (14 N. W. 446); *Sutton v. Des Moines Bakery Co.*, 135 Iowa 390; *Muldowney v. Illinois C. R. Co.*, 39 Iowa 615; *Newbury v. Getchel, etc., Mfg. Co.*, 100 Iowa 441; *Gulf C. & S. F. R. Co. v. Montgomery* (Texas), 19 S. W. 1015; *Houston & T. C. R. Co. v. Evans* (Texas), 92 S. W. 1077; *Texas M. R. Co. v. Ellison* (Tex.), 87 S. W. 213; *Reynolds v. Missouri, K. & T. R. Co.* (Kas.), 78 Pac. 801; *Jordan v. City of New York*, 60 N. Y. Supp. 696; *Artman v. Kansas Central R. Co.*, 22 Kas. 296. See, also, *Hartman v. City of Muscatine*, 70 Iowa 511; *Parkhill v. Town of Brighton*, 61 Iowa 103; *McGinty v. City of Keokuk*, 66 Iowa 725; *Barce v. City of Shenandoah*, 106 Iowa 426; *Ford v. Chicago, R. I. & P. R. Co.*, 106 Iowa 85; *Kelsey v. Chicago & N. W. R. Co.*, 106 Iowa 253; *Landis v. Interurban R. Co.*, 166 Iowa 20.

For the reasons hereinbefore set out, the case is—
Reversed.

DEEMER, LADD and SALINGER, JJ., concur.

J. P. PRICE, Appellant, v. TOWN OF EARLHAM et al., Appellees.

CERTIORARI: Improvident Writ—Procedure. When a petition in
1 certiorari shows on its face that the writ issued thereon is improvident, the defendant may, even though return has been filed, reach such defect by motion for judgment on the pleadings, and it is not objectionable that he employs, to accomplish this result, a motion to dismiss the petition.

EMINENT DOMAIN: Sheriff's Jury—Qualifications—Bias and
2 **Prejudice.** Bias and prejudice on the subject of the owner's damages do not disqualify a sheriff's jury appointed to assess damages by reason of the taking of private property for public use (in the present case, for cemetery purposes), provided the jurors (a) are freeholders of the county (or city), and (b) are not interested in the same or a like question. Appeal affords adequate remedy for the correction of any resulting wrong. So *held* where the jurors, owing to defective proceedings, had, in the same proceeding, thrice served as such jurors. (Sections 884, 1999, 2000, Code, 1897; 2009, Code Supp., 1913.)

Appeal from Madison District Court.—W. H. FAHEY, Judge.

FRIDAY, APRIL 7, 1916.

THE petition in the first case was filed October 12, 1914, and alleged, in substance, that the defendants, being the mayor and councilmen of the incorporated town of Earlham, on April 7, 1913, adopted a resolution declaring certain land necessary for cemetery purposes, and instructed the mayor and clerk to make written application to the sheriff of Madison County for the appointment of commissioners to inspect the same and assess the damages the owner thereof would sustain by the appropriation thereof for said purposes; that they so did, and that the sheriff appointed commissioners and designated September 14, 1914, at 10 o'clock A. M., to inspect and assess such damages; that defendants acted illegally and exceeded their jurisdiction, in that the commissioners did not meet and perform their duties at the time specified, but at

some other time and place, of which no notice was given plaintiff, and assessed said damages; and that defendants were intending and threatening to take possession of said property; that plaintiff was without a plain, speedy and adequate remedy at law, and prayed that a writ of certiorari be issued, commanding defendants to certify the proceedings in the district court. Such writ was issued and return made thereto, as required. The defendants thereupon moved that the petition be dismissed, and an order of continuance was entered, October 20, 1914; but on the following day the defendant moved that said order of continuance be set aside, and asserted that the sheriff had postponed the inspection and examination of the premises from 10 A. M. to 2 P. M. of the day fixed, without notifying the owners of the land, and for this reason the defendants confessed the lack of jurisdiction on the part of the commissioners, and asked that an order be entered finding that the commissioners were without jurisdiction, that their assessment of damages, as returned, be set aside, and that an order be entered directing the service of a new notice of condemnation. This motion was sustained, and an order was entered accordingly, and it was further "adjudged that the incorporated town may proceed with the condemnation proceedings," and that "after first giving to the plaintiff notice of the time and place when said commissioners will meet to inspect and assess the damages which the said J. P. Price will sustain by reason of the taking of the property." From this ruling, the plaintiff appeals.

On December 1, 1914, plaintiff filed his second petition, containing the same allegations as to defendants, the ownership of the property, the resolution and proceedings to condemn, but alleged that the commissioners appointed by the sheriff had inspected the property and filed their report with the sheriff, but that the defendants, in connection therewith, had acted illegally and exceeded their jurisdiction, in that five of the commissioners appointed by the sheriff had, theretofore,

under the appointment of said sheriff in the same condemnation proceedings, acted three times as commissioners to inspect said real estate and assess such damages; that in each of said cases the commissioners did inspect and assess such damages, and in each, they duly returned to the sheriff their sworn statement and report of the damages assessed; that by reason thereof they had become biased and prejudiced and were disqualified and incompetent to act further as commissioners; that defendants were threatening to proceed with such condemnation proceedings and take possession of the property; that plaintiff was without plain, speedy and adequate remedy at law and prayed that a writ of certiorari issue, commanding defendants to make return of the record and proceedings in connection therewith. The writ was issued, and return made as required. On December 16, 1914, defendants moved that the petition be dismissed, for that: (1) the facts stated in the petition do not entitle plaintiff to have the writ issued; (2) he has a plain, speedy and adequate remedy by appeal; and (3) plaintiff has taken appeal in this proceeding from the award of the sheriff's jury to the district court. The motion was sustained, and plaintiff appeals.—*Affirmed.*

J. W. Rhode and D. H. Miller, for appellant.

John A. Guñer, for appellees.

LADD, J.—In sustaining the defendant's motion to enter an order setting aside the assessment of damages suffered by the owner from the appropriation of his property for cemetery purposes, the court directed that "the incorporated town of Earlham might proceed with condemnation proceedings with the commissioners heretofore appointed," after first giving notice to such owner. Of this, plaintiff complains in the first case, for that, as is said, the commissioners, having previously inspected and assessed the property, were biased and prejudiced, and thereby rendered incompetent to serve. Subsequently, the sheriff designated five of said commissioners, with

another, to inspect and appraise the land at a time fixed, and they so did.

In the second case, the landowner sought to test, by proceedings in certiorari, the legality of appointment and service of said commissioners, for that, as is alleged, they were biased and prejudiced by having served thrice previously in the inspection and assessment of damages to the owner by the appropriation of the same parcel of land, and thereby became so biased and prejudiced as to render them incompetent to serve as commissioners. The decision, in each case, depends on whether previous service of commissioners in assessing the damages consequent on appropriating the same premises, and the bias and prejudice resulting, render them incompetent to act as such, in the inspection and assessment of such damages in subsequent proceedings to condemn. The motion to dismiss the petition in the last case was on the grounds that the facts, as stated, did not entitle petitioner to the issuance of a writ of certiorari, and that, by appeal, plaintiff was afforded a plain, speedy and adequate remedy at law.

I. It will be noted that the motion is not grounded on mere defects in the petition, but goes directly to the merits, in asserting that, conceding the commissioners to have been biased and prejudiced, they were not disqualified, and that the remedy for any injustice done must be through appeal. In other words, the contention was that the writ was improvidently granted. That the writ may be quashed or suspended in these circumstances seems to be well established. 6 Cyc. 813, and cases collected in notes. Certainly, nothing appears in *McKinney v. Baker*, 100 Iowa 362, and other cases cited, to the contrary. But the motion was not to quash the writ, but that the petition be dismissed. The return had been filed, so that the issues were complete, and the motion was, in effect, one for judgment on the pleadings. See *Scott v. Wilson*, 150 Iowa 202; *In re Estate of Kennedy*, 154 Iowa 460. In a case like this, however, nothing is accomplished by filing such

1. CERTIORARI:
improvident
writ: procedure.

a motion; for, necessarily, the petition and return presented the identical issues as if submitted on the merits. The procedure, then, is not in the way of determining the question presented.

II. Section 880 of the Code authorizes the taking of land for cemetery purposes, and Section 884, Code, declares that proceedings for condemnation "shall be in accordance with the provisions relating to taking private property for works of internal improvement, except that the jurors shall have the additional qualification of being freeholders of the city or town." Section 1999 of the Code (of such provisions) directs that "the sheriff of the county in which such real estate may be situated shall, upon written application of either party, appoint six freeholders of said county, not interested in the same or a like question, who shall inspect said real estate, and assess the damages which said owner will sustain by the appropriation of his land for the use of said corporation, and make report in writing to the sheriff of said county."

The city, upon payment of the damages, may take the property.

"Section 2000. The freeholders appointed shall be the commissioners to assess all damages to the owners of real estate in said county, and said corporation, or the owner of any land therein, may, at any time after their appointment, have the damages assessed in the manner herein prescribed, by giving the other party ten days' notice thereof in writing, if a resident of this state, specifying therein the day and hour when such commissioners will view the premises, which shall be served in the same manner as original notices."

The only qualifications prescribed by statute, then, are that the commissioners shall be freeholders of the municipality and not interested in the same or a like question; and by designating these, it would seem others are excluded by necessary implication. This is confirmed by the procedure prescribed. It is outside of court unless an appeal is taken to the

2. EMINENT DOMAIN: sheriff's jury: qualifications: bias and prejudice.

district court. Section 2009 of the Code. No tribunal to pass on the qualifications of the commissioners is contemplated, save in the respects designated, and these must be ascertained by the sheriff in appointing. He is nowhere authorized to pass on other objections to commissioners, and no provision is made for interposing objections on the ground of bias or prejudice, or other disqualifying circumstance, or for passing on such objections. It cannot well be supposed, then, that qualifications other than those mentioned, which the sheriff must ascertain, are contemplated. As said in *Road Commissioners v. Morgan*, 47 Pa. St. 276:

“This is a special tribunal, a sort of a *pied poudre* court, a neighbourhood *forum* emanating entirely from the legislative will; its machinery and scope springing exclusively from the same munificent source. As such a tribunal for such purposes is not objectionable on constitutional grounds, we are bound to abide the legislative will on the subject and follow its lead.”

A person cannot, according to the scheme prescribed, be a commissioner unless he is a qualified freeholder of the municipality, not interested in the same or a like question. This is the sheriff's guide in summoning them, and if he sees to it that they have these qualifications, he has performed his full duty in the matter of selection. All the decisions reaching a different conclusion construe statutes under which the court appoints the appraisers, and the hearing is before it, or the report is returned into court, and therefore in some manner under the guidance or supervision of a tribunal authorized to pass on objections to the qualifications of such appraisers. *Detroit v. Heineman*, 128 Mich. 537; *Folmar v. Folmar*, 68 Ala. 120; *Hunter v. Matthews*, 12 Leigh (Va.) 228. The remedy, in event of any injustice in fixing the damages, is by appeal to the district court, where full hearing before an impartial jury is assured. On the ground that bias or prejudice, to be inferred from previous service as a commissioner, did not vitiate the proceedings, the petition was rightly

dismissed. In view of this conclusion, it is unnecessary to consider whether certiorari was the proper remedy. Both judgments are—*Affirmed*.

EVANS, C. J., GAYNOR and SALINGER, JJ., concur.

J. F. SANDERS, Appellant, v. SUTLIVE BROS. & COMPANY et al.,
Appellees.

APPEAL AND ERROR: Reversal—Proceedings After Reversal. A general order of reversal in a law action, tried in the lower court to the court, has the effect of sending the cause back to the lower court for full retrial, even though the opinion on reversal shows that the evidence was insufficient to sustain the judgment of the lower court. The Supreme Court *may* avoid a retrial, if the circumstances warrant, by entering, or by specifically ordering the lower court to enter, a final judgment. (Sec. 4139, Code, 1897.)

PRINCIPLE APPLIED: The final language of the opinion on reversal was: "From the conclusions reached, the judgment of the trial court is reversed." The procedendo to the lower court ordered: "Further proceeding to be had in said court not inconsistent with the opinion of the Supreme Court." *Held*, the lower court should have tried the cause *anew*.

Appeal from Lee District Court.—H. BANK, JR., Judge.

MONDAY, NOVEMBER 1, 1915.

REHEARING DENIED FRIDAY, APRIL 7, 1916.

ACTION at law. Upon a reversal of the case in this court, procedendo issued, and thereafter in the district court, plaintiff filed a motion assailing defendants' answer, and defendants filed a motion for a final judgment upon the procedendo. Plaintiff's motion was overruled. Without the introduction of any evidence or the offer of any, the trial court sustained defendants' motion for final judgment, dismissed plaintiff's petition, and rendered judgment against plaintiff for costs Plaintiff appeals.—*Reversed*.

John M. Dawson, W. J. Roberts, and A. W. O'Hara, for appellant.

Hughes & McCoid, for appellees.

PRESTON, J.—1. The substance only of the answer and plaintiff's motion attacking it are set out in the abstract. We do not understand plaintiff to now rely upon that ruling for reversal. The reversal upon the former appeal was general, and in the opinion, there was no specific direction to enter judgment in accordance with the opinion. 163 Iowa 172. The reversal of a law case ordinarily means a new trial. Under certain circumstances, the Supreme Court may render such judgment as the district court should have rendered, or direct it to be done. Code Section 4139. The procedendo issued from the office of the clerk of the Supreme Court stated that said court:

APPEAL AND RE-
VERSAL: reversal:
proceedings
after reversal.

"Did reverse the judgment aforesaid as rendered in the court below, and order further proceedings to be had in said court, not inconsistent with the opinion of the Supreme Court."

The opinion of the Supreme Court, rather than the clerk's interpretation of it in the procedendo, controls as to what the holding and decision of the court was.

We think the case is ruled by the opinion in *Landis v. Interurban*, 173 Iowa 466. The only difference is that in that case, the trial was to a jury; while in the instant case, a jury was waived and the trial had to the court. The first judgment in this case recited that the court "finds for the plaintiff." There was no specific finding of facts. It is said by appellant that this court's review of the evidence upon the former appeal of this case was made in the consideration of the standing motion for a new trial, originally provided for by Chapter 49 of the Acts of the 11th General Assembly, and still supplied by Section 4106 of the Code, upon the ground that the lower court's general finding was not sustained

by, or was against, the evidence; and that the opinion in this case was a ruling that such motion was or should be sustained by the lower court upon remand. We are inclined to this view, but we think it is now more a question of the construction and effect of the order of reversal. The cases, or many of them, are referred to in the *Landis* case, *supra*.

It is contended for appellees that "specific directions contained in the mandate of the appellate court are beyond the judicial discretion of the lower court, and hence must be implicitly followed by the latter court," citing 3 Cyc. 481; and that when a case has been remanded, with special directions, it is out of the power of the court receiving such directions to open the case and have a new trial. This may be conceded. But in this case, the reversal was general, without any specific directions, except that the procedendo provided that the lower court proceed in a manner not inconsistent with the opinion of the Supreme Court. Appellees also contend that it is the rule of the Supreme Court that the decision of that court on appeal becomes the law of the case on a retrial, and the lower court must follow it, whether right or wrong; and that, if the pleadings and the facts are substantially as those in the case on appeal, then the court below on retrial can do nothing but enter a new judgment in accordance with the opinion of the Supreme Court. Undoubtedly, if the pleadings and the facts are the same on the retrial, then the lower court should be ruled by the opinion of the Supreme Court. But whether the facts are the same on a second trial depends upon a hearing of the facts, and would be determined upon the second trial. The parties have the right to put in further or different evidence on a retrial. Upon the new trial, the appellee has the right and may be able to make out a case in accord with the opinion of the Supreme Court. *Artz v. Chicago, R. I. & P. R. Co.*, 38 Iowa 293; *Russ v. American Cereal Co.*, 110 Iowa 743, 121 Iowa 639, 641; *Vogt v. Grinnell*, 133 Iowa 363. In the case cited by appellees on

this proposition, there was a second trial. *Johnson v. Chicago, St. P., M. & O. R. Co.*, 123 Iowa 224.

Counsel for appellees cite the case of *Drefahl v. Tuttle*, 42 Iowa 177, where it is said:

"When a cause is tried by the court without a jury, it is not necessary, in order to secure a review of the case in the Supreme Court, that there should have been any finding of facts or conclusions of law stated on the record. . . . In this case, the court made a finding of facts and stated his conclusions of law thereon. These are part of the record, and upon these, the error of the court is made to appear. From the facts found, the court should have rendered judgment for the plaintiff instead of for the defendant. The judgment must, therefore, be reversed and the cause remanded, with directions to the district court to render judgment for plaintiff, or, if he so elect, such judgment may be rendered in this court."

It is said by appellees that this case is on all fours with the case at bar. But a clear distinction is that in that case, there was a specific direction by the Supreme Court in its opinion to the district court to render judgment for the opposite party. Generally, where the finding of the court or verdict of the jury is not sustained by the evidence, the remedy is a new trial.

Other questions are argued, but the determination of the foregoing decides the case. For the reasons given, the cause is reversed and remanded for a new trial, with directions to the district court to proceed and hear the case anew. If the record is the same on the retrial, the court will be controlled by the opinion on the first appeal; and if there is a change in the testimony, the trial court should exercise its judgment on the record as the case then stands.—*Reversed and Remanded.*

EVANS, C. J., DEEMER and WEAVER, JJ., concur.

ESTHER E. SQUIRES, Appellant, v. JOHN COOK et al.,
Appellees.

APPEAL AND ERROR: Abstract of Record—Amendment—Requirements. Counsel owes the duty to the court, in the preparation of an amended abstract, to specifically point out the page and line of the original abstract which he is correcting. (Rule 32.)

WILLS: Undue Influence—Fiduciary Relations—Evidence. Evidence reviewed, and held to present a jury question whether the will was the result of the undue influence of a devisee, who himself drew the will at a time when no one was present but himself and deceased, and who was then occupying a fiduciary relation towards the aged deceased.

WILLS: Undue Influence—Fiduciary Relations—Burden of Proof. A showing that a devisee himself drew the purported will at a time when only he and the infirm and aged testatrix were present, coupled with a further showing that said devisee then occupied an intimate fiduciary relation towards testatrix, may be sufficient to raise a presumption that the purported will was the result of the undue influence of said devisee, with consequent burden on devisee to rebut the unfavorable presumption.

WILLS: Undue Influence—Evidence—Connected Transactions. What amount of property a devisee, charged with undue influence on his infirm and aged mother, received out of his father's estate, may be so connected with the making of the mother's will and the contest thereon as to become decidedly material.

WILLS: Undue Influence—Evidence. On the question whether the purported will of an infirm and aged testatrix was induced by the undue influence of her son, evidence is admissible that the son and his wife interfered with the visits of partially disinherited heirs to their mother.

WILLS: Undue Influence—Evidence. On the question of the value of the estate of a mother whose will was under contest, evidence of the value of the personal property of her deceased husband may become material, the mother having received a portion of the latter.

WILLS: Undue Influence—Evidence. On the question of undue influence, it may be shown that he who is charged with having exercised such influence had been known to physically abuse testatrix.

Appeal from Crawford District Court.—M. E. HUTCHISON,
Judge.

FRIDAY, APRIL 7, 1916.

THE will of Elizabeth Cook, deceased, was admitted to probate on September 14, 1911. In August, 1912, plaintiff brought this action to set aside the probate, on the ground that the will was the result of undue influence on the part of defendant, John Cook, and because, at the time the will was made, deceased was not of sound, disposing mind and memory. There was no evidence introduced on behalf of the defense. At the conclusion of plaintiff's testimony, on motion of defendant, the court directed a verdict in favor of the defendant. The plaintiff appeals.—*Reversed and Remanded.*

J. P. Conner, for appellant.

Andy Bell, Saunders & Stuart, and Sims & Kuehnle, for appellees.

PRESTON, J.—1. Appellee has filed an additional abstract of about 20 pages, but we do not get much help from it, because the rules have not been complied with in a number of instances

1. APPEAL AND
ERROR: abstract
of record:
amendment:
requirements.

in the additional abstract, for that the page and line of the abstract where corrections are sought to be made are not given in the additional abstract. For instance, on page 4 of appellee's abstract, we find this:

"Plaintiff's Testimony. Mary E. Nelson. Direct Examination. Upon reading of the deposition, the defendant made the following objection: 'The defendant objects to Interrogatories 20 to 32, inclusive, and the answers thereto, as incompetent, irrelevant and immaterial, and calling for hearsay testimony, and I want to include in these objections, also, Interrogatories 33, 34 and 35, and the answers thereto.' And upon the offer of Interrogatory 32, 'What did Mr. Cook

get out of the estate?' the defendants made the additional objection, 'This is the father's estate long years before,' and the objection was sustained. (Tr. 61.)"

Again, on page 5, we find this:

"The objection to Interrogatories 67 and 68 was, 'I object to 67 and 68, and the answers thereto, as incompetent and immaterial,' and the following was added thereto (Tr. 68): 'This is for the years prior to the making of the will while she was living with her daughter.'"

Again, at pages 7 and 8, corrections are made in the testimony of another witness, but the page of the abstract and the numbers of the lines are not given. As to some of the testimony set out in the original abstract, reference is made to the place in the abstract where the correction was sought to be made; but as to others, there is no reference at all. We could go through the abstract and probably find the language sought to be corrected. In some cases, this would be quite difficult and would take time. We think attorneys should do that, and the rules require it. If we had plenty of time, perhaps we ought not to object to the additional labor; but the fact is, we are not short on labor, though we are short of time.

2. The principal question in the case is as to whether there was sufficient evidence in the record to go to the jury on the question of the alleged mental incapacity, or undue influence, or the two in combination. Under the

2. WILLS: undue
influence:
fiduciary rela-
tions: evidence.

rules, where there has been a directed verdict, the record should be construed more favorably to appellant.

It will be necessary to refer to some of the more important facts. The husband of deceased died in November, 1890. Before his death he had made a will, at the making of which, we understand from the record, the defendant, John Cook, a son, was present. After her husband's death, Elizabeth Cook remained on the home farm until the following spring, when she went to live with her daughter, Mrs. Nelson, whose name at that time was Mrs. Coleman. Deceased remained on the

farm with her daughter for several years, when defendant, John Cook, came to the home of the daughter, Mrs. Coleman, and, as she claims, without notice, took the mother to his own home, where she lived until her death, on June 20, 1911. The old lady was 87 years of age at the time of her death. At the time she left Mrs. Coleman's and went to live with her son, deceased was about 75 or 76 years of age, and had not made a will. She did make a will in 1900, which is as follows:

"I Elizabeth Cook of the City of Denison, County of Crawford and State of Iowa, do make and declare this to be my last will and testament in manner and following to wit:

"First I give and bequeath to the Children of my Daughter Elizabeth Taplin One Thousand Dollers to be equelly devided among them.

"Second I give and bequeath to the children of my daughter Sarah Ann Bartlett One thousand dollers to be equelly devided among them

"Third I give and bequeath to my Daughter Mary E. Coleman One thousand dollers

"Fourth I give and bequeath to my daughter Ellen E. Cook (Nee) Ellen E. Donnelly twenty Seven hundred twenty five and 38-100 dollers by Cancelling all sums of indebtredness owed by such person to me March 4, 1896.

"Fifth I direct that all debts and funeral expenses be paid from money in possession of my son John Cook for such purposes.

"Sixth I give Demise and bequeath to my Son John Cook all property and money that there may be after Complying with paragraphs One, Two, Three, Four and Five of this document.

"Seventh whereas on account of age and infirmaties I am unable to manage my property I have for some time past turned the same over to my Son John Cook having full confidence that he will comply with this my last will and testament."

A few months after she was taken into her son's home,

the will was made, and following her death, was admitted to probate without contest. The evidence shows that, at the time the will was made, the value of the estate was about \$6,000, and it also shows without dispute, and it is in fact conceded by defendant, that the will was prepared by him; that it was written by him in the room upstairs occupied by deceased, at a time when no one but himself and his mother was present.

As stated, the defendant was present at the making of his father's will, and received a large share of the estate. The sisters were very much dissatisfied with the share of the estate their father left them in his will: a contest was threatened, and the sisters came to Denison for the purpose of contesting their father's will. But their claim is that this was avoided by an agreement between the parties that the mother, Elizabeth Cook, should leave her estate to the two sisters, to be divided equally between the two, and that this agreement was made between the two sisters, the mother and the defendant John Cook, and that the consideration for the agreement on the part of the defendant was a promise on the part of the sisters that they would not contest the will of the father.

There is testimony, and not disputed, that, in the early part of July, 1900, a few days after the making of the will of deceased, Elizabeth Cook, the defendant called at his sister's place of residence in Kansas City; and defendant said to her that his mother was not well, and that she had made her will and left \$3,000 to her, and he wanted to know if that would be satisfactory and if she would not attempt to break the will. The sister said in reply that it was not exactly as much as she expected, but she would not contest the will, and he said that he would see that she got it in cash. The plaintiff, a daughter, testifies that she heard her mother and Mrs. Coleman, now Mrs. Nelson, talking, on June 12, 1900, about the property; and in this conversation, the mother stated to Mrs. Coleman that it was her purpose to divide the property between the two girls. This was but a few days before the will was made, and before defendant went to Kansas City to

see his sister. After defendant, at Kansas City, had said to plaintiff that his mother had made a will and left her \$3,000, Mrs. Squires, the plaintiff, testified that she heard a conversation between her sister Mary and her mother, in which her mother told her that she had done as she had agreed to do with the children; that she had left Mary and plaintiff the property; that, after caring for her at her death, what was left was to come to the girls, after all expenses were paid; and that she said she had made a will. No word was sent to Mrs. Squires, the plaintiff, of her mother's illness, and the first she knew was a telegram announcing her death. Plaintiff's husband testified that he heard deceased say to his wife that she had left her something over \$3,000, and would have left her more, but her son objected. This was in December, 1900. A sister of plaintiff's testified that the home farm was sold shortly after deceased went to live with defendant; that defendant sold it; that he managed the business for his mother; that she had but the one brother; and that she thinks the farm was sold at \$37 per acre; that defendant took the mother away from the home of witness about 1898 or 1899 and took her goods to Denison; that witness took the mother to the train for Denison; that she did not know before the day defendant came that the mother was going and had no conversation with him about taking her away; that deceased would have spells that would last two or three days, about every four or six weeks; was not raving or hard to control; and says further:

"When I was there, she was always in a frame of mind to visit; she always knew me; I don't know of any extraordinary care she had; so far as I know, my brother and his wife cared for her; there were several occasions he did use restraint in trying to compel her to be quiet; she would be restless. Probably he would say, 'Mother, you must not do that; you must be quiet.' There wasn't so much faultfinding with me as with my sister, Mrs. Squires. He didn't care to have her at his home. I have heard him say so; that he didn't

care to have her come. Defendant, during the last part of mother's life, denied plaintiff the right to come and see her; did not like to have her come. While mother was kept in the room upstairs, she could go about the house if able, and did as long as she was able; but the last two years, she was not able to move about much. I do not mean to say that mother was restrained of her liberty or kept there in the room upstairs against her will. Mother's health was apparently good when she went to Jackson County. She had spells that she did not know anybody for a day or two. I saw her once or twice. She had her spells, just as she always had them. She seemed to have pain. She did not know us; she did not recognize us for the time being while she was under the influence of the spells. They did not last long, not over a day or two. I took mother and left her at the home of my brother at different times. I was about 16 miles from them. In the fall of 1899, when I was going on a visit, I left her for a day or two with my brother. Mother's stroke of paralysis was in 1902."

Plaintiff testified that deceased, in a conversation with defendant, said that what was left when she died should be divided between Mrs. Coleman and plaintiff; that she heard her mother tell defendant that, "that is, if we didn't break the will of father's, he agreed to it." She says she saw her mother in June of 1900, and that the mother was not very well; that, when plaintiff went in to see her mother, the mother asked who she was and did not know her; that deceased seemed to be in a doze some way, did not seem to be bright; that witness cried because her mother did not recognize her. She says further:

"I heard mother say to Mrs. Coleman, now Mrs. Nelson, that her head hurt her so bad, that she had complained of the pain for two or three days."

She says that she heard a conversation between her mother and Mrs. Coleman in June, 1900, before the Kansas City trip, about the property; that "she said she intended to divide it amongst us two youngest girls."

She testifies that her husband was a railroad man and moved around different places a good deal, and that her mother said she had left plaintiff enough to buy a little home, and didn't want her to run around through the country so much. She says further:

"The next June, 1901, I was there, and mother and I were talking in her room and John overheard the conversation; and he afterwards told me downstairs to pay no attention to what mother said, for she was crazy, and had been for several years at times. He was always complaining about her mind, and he said that they had had so much trouble with her that they thought once that they would have to put her in the asylum. This continued at the different times I was there. Mother seemed to get mixed up as to what happened in late years; she didn't remember. I noticed this along about the time the will was made, or before, or soon after. She had these sick spells for several years, even when she was on the farm with Mary. Her mind wasn't clear for two or three days, it seemed, and then that spell would pass off and she could remember everything again. She acted queer at times."

Another witness testifies that defendant told him that he had been at Kansas City, and had told his sister that her mother had willed her \$3,000. Defendant was executor of his mother's estate and filed a report, which had not been acted upon at the time of the trial of this case. It shows that he sold his mother's farm while she was alive and borrowed the proceeds, \$5,000, from her, giving his note for it, and kept the note in his possession. The first item in this account is January 1, 1900, a few months before the will of deceased was made. The will, heretofore set out, states that, on account of age and infirmities, she is unable to manage her property, and that she has turned her property over to her son to manage. Appellant claims that the account shows a purpose on the part of defendant to absorb the mother's estate before she died.

They call attention to the charge of \$1,378 per year for board, lodging and nursing. But the record shows that this claim had not been passed upon at the time of the trial of the will case. The report shows the collection and receipt of moneys by defendant, and that he paid out numerous small items for her, and some larger items too; but that, from 1900 to about the time of her death, he was receiving and paying out money and acting as her agent and managed her business for her.

The defendant, John Cook, was called as a witness for plaintiffs, the contestants, and testified, among other things, that his mother's land was sold in the spring of 1892; that he cannot say what it was sold for.

"My mother's will was deposited with the clerk of the courts; I brought it up and deposited it with the clerk shortly after it was made. At the time I drew this will, I had some money that belonged to mother, for the purpose of paying funeral expenses. I gave my mother my note after my father's death and before her death, and after the will was made, in 1900, mother turned this note over to me when she made the will. Mother turned the note over to me when the will was made, and the report dates back to January 1st, when we had our last settlement before she made the will. The report means that the note was on hand."

It should have been stated that the first item in the report before referred to, January 1, 1900, is amount of notes surrendered, \$4,944.50, and it shows, on the same date, cash received from other sources, \$471.01. Defendant, as a witness, continued:

"The statement means that the note was on hand. I have got it in my book on hand, and the statement that Mr. Simms' clerk made out that from was 'on hand,' not 'surrendered;' it was money that mother had in notes at that time when the settlement was made in 1900. The settlement made on January 1st was the settlement respecting her property, and this note was her property, and if not at that time in my possession, it soon after came into my possession, and I kept it

in my possession after the will was made. I suppose the statement in the will, 'Whereas, on account of age and infirmities, I am unable to manage my property, I have for some time past turned same over to my son, John Cook,' is a truthful statement for what it was meant. Q. Then for some time past you had had her property, had you not? A. Part of her property. Q. Why did you not qualify it when you phrased the will? (Objection sustained to this last question.) A. I drew this will. It means property that mother had in Vail that was being rented out. It was where she couldn't handle it, couldn't collect the rent off of it. I didn't have her property at that time. January 1st, I had other proceeds in my possession. Here is an item of \$471.01. I can't remember things from memory. I prepared this will in mother's room at home. Nobody but myself and mother were there. It was in the morning of the 20th day of June; I can't remember what time in the morning. My mother had been at my home from November preceding the June the will was made."

It is barely possible that, as to the question of mental capacity alone, a jury would not be justified in setting aside the will. But we have the situation here where defendant, a beneficiary under the will to the extent of probably \$3,000, or more, drew the will when he and his mother alone were present, in defendant's own home, and at a time when there was a fiduciary relation existing between the deceased and the defendant. He had been managing her business and acting as her agent, and we think the circumstances were such as that a presumption arises against the defendant and that an explanation is required; and that, under the circumstances of this case, it would be a question for the jury as to whether any explanation which may be offered is sufficient.

Appellee cites cases to the familiar doctrine that advice or solicitation will not vitiate a will, unless it be shown that the freedom of will was impaired or destroyed thereby; that opportunity alone is not sufficient; and that the undue influ-

3. WILLS: undue influence: fiduciary relations: burden of proof.

ence must be operative at the time the will is executed. But we have cases where it is not necessary that a person should be present, even. In this case, the defendant was present, and he alone, with his mother. Appellee cites *Hanrahan v. O'Toole*, 139 Iowa 229, where the chief beneficiary was the scrivener of the will. The holding was that, under the circumstances of that case, the presumption of undue influence did not obtain. The court, speaking through Mr. Justice Weaver, said:

“That there may be circumstances under which the proponent of a will must assume the burden of removing an unfavorable presumption of this kind may be admitted, but this is not shown to be a case of that nature. In the first place, there is no showing of such relation of confidence between the testator and Hanrahan as the rule cited by counsel contemplates. It is true that Hanrahan was the testator's son-in-law, but that fact alone is not sufficient to justify a presumption of confidential relations between them. There are some suggestions in the record indicating that Mr. O'Toole had considerable respect for the judgment and business ability of Hanrahan, but that he looked to him or relied upon him for guidance or was in any manner subject to his control or leadership is nowhere shown. There is no testimony that the father and son-in-law were then standing in the relation of principal and agent, or were so intimately associated in their business, social, or family affairs as to justify a presumption of undue advantage on part of the latter. The fact of family relationship or of the existence of the confidence and reliance which persons ordinarily repose in acquaintances and friends whose constancy and integrity they have tried will not justify a presumption of undue influence in the utter absence of any further showing that such trust has been abused.”

And reference is there made to the *Butcher* case. But, as bearing upon the question of burden of proof where there is a confidential relation, see the late case of *Curtis v. Armagast*, 158 Iowa 507.

But, under the circumstances of this case, where the deceased was old and feeble and a confidential relation existed, we think the rule announced in *Ross v. Ross*, 140 Iowa 51, at 61, to the effect, briefly stated, that, if a person was aged and of impaired mind and memory, though he may not have been legally incompetent to make a will, yet the will of such a person ought not to be sustained unless such disposition of his property appears to have been fairly made, and to have emanated from a free will, without the interposition of others; and that, if the jury should find, under all the circumstances, that the disposition of the property did not emanate from a free will and was not in accord with testator's previous intentions, etc., the jury would be justified in finding that the will was not the voluntary act of the testator, but that it was obtained by undue influence. We have not attempted to give the exact language, but the substance only.

We shall not refer to the other case cited. From what has been said, it is manifest that there was sufficient in this record to take the case to the jury.

3. Quite a large number of errors are assigned on rulings of the trial court on the admission and exclusion of evidence. It was the claim of appellant that the defendant,

John Cook, had received substantially all of his father's estate, some \$17,000, but they were not permitted to prove this. Error has been assigned because the court refused to

let the witness Nelson tell what property her brother, the defendant, got out of her father's estate, and what it was worth. It is true that the will of the father was not being contested in this case, but defendant was present also when the father's will was drawn, and the transaction is so connected with the estate of his mother and the execution of the mother's will, and the circumstances shown, that it would have a bearing and should have been admitted.

Another assignment of error is that the court refused to permit Mrs. Nelson to testify that the defendant and wife

4. WILLS: undue influence: evidence: connected transactions.

interfered with plaintiff's visiting her mother and seeing her.

We think the evidence was proper. The court also refused to permit Mrs. Nelson to state what she knew of her father's personal property at the time of his death.

5. WILLS: undue influence: evidence.

We think it was proper to show this, so that it might be determined what was the value of the mother's estate, if the mother got any part of the personal property or money.

6. WILLS: undue influence: evidence.

There is some confusion in the record, and some of the matters assigned as error are because appellant claims that the court refused certain testimony; but, as we gather from the record, the testimony, as to some of these matters at least, was permitted. Without going into all these matters, we may say that we think the appellant was restricted somewhat too closely in regard to showing matters similar to those above indicated. One other circumstance, perhaps, should be referred to which has been assigned as error, and that is that the court refused to allow Mrs. Squires to testify that defendant struck his mother, and that his mother cried. This might operate against the plaintiff's contention, perhaps, in one sense, that the mother would be less likely to give a large part of the property to a son who had mistreated her, and yet, on the question of influence or fear, perhaps, the evidence was admissible, at least.

7. WILLS: undue influence: evidence.

For the reasons given, we think the judgment of the district court ought to be and it is reversed and the cause remanded for a retrial or further proceedings in harmony with this opinion.

EVANS, C. J., DEEMER and WEAVER, JJ., concur.

STATE OF IOWA, Appellee, v. ALBERT A. BRACKEY, Appellant.

ASSAULT AND BATTERY: Great Bodily Injury—Intent—Aggres-

- 1 **sion—Evidence.** Evidence reviewed and held sufficient to support a finding that defendant (a) was the aggressor and (b) assaulted with intent to inflict a more serious injury than an ordinary battery,—in other words, a great bodily injury.

INDICTMENT AND INFORMATION: Assault With Intent—Man-

- 2 **ner of Assault—Sufficiency.** The *manner* in which and the *means* by which the accused intended to commit an assault with intent to inflict a great bodily injury are sufficiently alleged by the charge that the accused did then and there “beat, strike and bruise” the prosecuting witness.

CRIMINAL LAW: Evidence—Opinion—Manner of Inflicting Wound.

- 3 A physician who has personal knowledge of the nature of the wound inflicted may testify that such wound was, in his opinion, inflicted by a certain instrument,—for instance, some dull instrument.

CRIMINAL LAW: Evidence—Opinion—Usurping Function of Jury.

- 4 A question which calls for an answer on the ultimate question which the jury must determine, is properly excluded. So *held* where the defendant, charged with assault with intent to inflict great bodily injury, was not permitted to testify “whether he used any more force on the prosecuting witness than was necessary to protect himself.”

ASSAULT AND BATTERY: Great Bodily Injury—Weapons—Fists

- 5 **Only.** One may commit with his fists only an assault with intent to inflict a great bodily injury.

ASSAULT AND BATTERY: Great Bodily Injury—Self-Defense—

- 6 **Instruction—Harmless Error.** Submitting the question whether defendant, charged with assault with intent to inflict great bodily injury, apprehended danger of great bodily harm from the prosecuting witness, and correctly advising the jury of the law of self-defense manifestly accords defendant full protection, especially where the record rendered it doubtful whether defendant had any occasion to apprehend danger of great bodily harm from the prosecuting witness.

CRIMINAL LAW: Self-Defense—Right to Meet Force With Force.

- 7 A person assaulted may always meet force with force, but no more than a battery may be inflicted unless this seems to be necessary to protect life or body from great harm, and not then if the as-

sailed party have reasonable opportunity to withdraw and avoid the conflict, and it so appears to him as a reasonable person.

Appeal from Winnebago District Court.—M. F. EDWARDS, Judge.

FRIDAY, APRIL 7, 1916.

THE defendant was convicted of having committed assault with intent to inflict great bodily injury, and appeals.—*Affirmed.*

T. A. Kingland, for appellant.

George Cosson, Attorney General, and *John Fletcher*, Assistant Attorney General, for the State.

LADD, J.—I. Bertha Brackey became 12 years old Sunday, August 2, 1914. The event was celebrated by a birthday party, to which all the Brackeys in the neighborhood, and some others, were invited. Liquid refreshments

1. ASSAULT AND BATTERY: great bodily injury: intent: aggression: evidence. were served, as was customary with them, and, late in the afternoon, began to work. Tom

Haugo pushed, or threw, his sister, the host's wife, to the ground. Turana Brackey, a sister-in-law of the latter, told Tom to be good, and her husband, Albert A. Brackey, the accused, came up and inquired, "Is that right to hit her?" and seized him by the throat. Albert's sister, Mrs. Dollan, told him to let go, but he would not, and she called for help. When her son Alf came, Albert knocked him down, and would not withdraw until she came at him with a board. Albert thought he might have "bumped" Alf, but explained that all the Dollans "climbed right on top" of him. Anyway, all agreed that he then retreated to the house, as his brother, Talleck, called for help, and kept the attacking party at bay while Talleck searched the house for munitions of war.

"There was Talleck Dollan, he had kind of a 2x4, or else a post, in his hand, about two feet long, and then Mrs. Dollan had a board, and Tom Haugo was with them too and had a piece of a bed post from an old bed."

Alf also was there. Albert was scared, and called on Gunder Weeks for help. But Gunder's discretion got the better part of his valor, and, after a slight advance, he retreated in good order to a place of safety; but Albert denounced him as a coward. Haugo got kicked when sneaking up on Albert, and then the Dollans untied their team and drove with their surrey towards the gate. On the way, they threatened his life. Nevertheless, he "walked just a little ways down that way." The buggy stopped and Dollan got out, and, according to Albert, said, "If there is any good man or stout man back there that thinks he's anything, come on and I'll fix him." Albert admitted fear of no one other than Mrs. Dollan, "walked with nothing in his hands," and, as "Dollan was coming towards him and" made a motion to hit him and "all were coming for" him, he "grabbed him and took him down, and was looking for the others too," and when he "saw them crowding out of the buggy . . . gave him some." He "hit him with my hands." He "thought" he "would scare them a little and make them go on," and he "got a little board and hit in the buggy top, and told them to go along." This was somewhat corroborated by his son and his wife, though the latter, as her husband approached his foe, turned her face away. But Alf swore that Albert "had a board in his hand;" that he "saw him going behind father" and that he "raised the board and struck him;" that his father "had then just gotten out of the buggy," and he "couldn't see just where it hit;" and that Albert struck at him. Dollan testified that, when out of the buggy, he "saw Albert coming toward" him; that then something hit him; that it happened so quickly that he did not notice what it was; that he saw he had a board; but did not see him hit with a board. Mrs. Dollan looked back as her husband left the buggy, and saw Albert "come running just behind her husband with a board in his hand;" and says that he first struck her husband with the board, and her husband fell to the ground; that he then used his fists. The physician who dressed Dollan's wound stated that there

were three wounds, one in the right temple about 1¼ inches long, extending through the tissues to the thin lining of the bone, another over the left eye, and the third in the eyebrow. The last two were not quite as deep as the one in the temple, and he expressed the opinion that the wounds were produced by some blunt instrument. From this evidence, the jury might have concluded that defendant was the aggressor; that he struck Dollan on the head with a board; and that, in doing so, he intended to inflict a more serious injury than an ordinary battery. The evidence was such as to preclude interference with the verdict.

II. The indictment was like that approved in *State v. Cummings*, 128 Iowa 522, and *State v. Carpenter*, 23 Iowa 506, and met requirements of *State v. Mitchell*, 139 Iowa 455, by alleging the manner in which and

2. INDICTMENT
AND INFORMATION:
assault
with intent:
manner of assault:
sufficiency.

the means by which the accused intended to commit the wrong, i. e., by beating, striking and bruising Dollan. The demurrer thereto was rightly overruled.

III. After describing the wounds, Dr. Helgeson was asked, "Could you tell from the wounds themselves as to how they had been produced, in a general way?" Over objection,

3. CRIMINAL LAW:
evidence: opinion:
manner of inflicting
wound.

the witness answered, "They were produced by some blunt weapon or instrument, whatever it may have been—something that wasn't sharp." The ruling was correct.

State v. Hessenius, 165 Iowa 415.

The defendant was asked whether he used "any more force on Talleck Dollan than was necessary to protect himself." The answer was stricken, for that the question called

4. CRIMINAL LAW:
evidence: opinion:
usurping function of
jury.

for the conclusion of the witness, and was a matter for the determination of the jury. The ruling has our approval. It was for the jury

to say, from the evidence of what was in fact done, whether excessive force was used. This was not a proper subject for opinion evidence. The witness was then

asked what he expected when Dollan got out of the buggy. An objection was sustained; but the witness afterwards testified that he "thought they were coming back to put up a fight right there." The subsequent answer removed all ground for complaint of the ruling.

IV. Appellant suggests that a person may not be guilty of an assault with intent to inflict great bodily injury unless he has other weapons than his fists. That this is not so appears

5. ASSAULT AND BATTERY: great bodily injury: weapons: fists only.

from *State v. Sayles*, 173 Iowa 374, where death resulted from a blow from the fist. The instructions requested were included in those given, in so far as they correctly state the law.

It may be doubted whether the defendant, as an ordinarily prudent man, had the right to apprehend danger of great bodily harm from Dollan; but surely the submission

6. ASSAULT AND BATTERY: great bodily injury: self-defense: instruction: harmless error.

in the 11th instruction of whether he did so apprehend, and advising the jury of the law of self-defense and of the duty to retreat if it seemed possible, to avoid inflicting great bodily harm, could not have been prejudicial.

A person assaulted may always meet force with force, but no more than a battery may be administered unless this seems to be necessary to protect life or body from harm, and not

7. CRIMINAL LAW: self-defense: right to meet force with force.

then if the assailed party have reasonable opportunity to withdraw and avoid the conflict, and it so appears to him, acting as an ordinarily prudent person. *State v. Goering*,

106 Iowa 636; *State v. Evenson*, 122 Iowa 88. The instruction was in harmony with the rule as stated, and the jury was warranted in finding that defendant was not acting in self-defense, and that, on any theory of the case, the force exerted was excessive and inexcusable. Too much alcohol and water for a birthday party! Exceptions to other instructions are hypercritical and require no attention.—*Affirmed*.

EVANS, C. J., GAYNOR and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. KATE FLYNN, Appellant.

PROSTITUTION, HOUSE OF: Corpus Delicti—Evidence to Establish.

- 1 **lish.** A charge of keeping a house of prostitution must, as a rule, be established by showing (a) the bad reputation of the house, (b) the purpose actuating those who resorted to the house, (c) the character of the persons occupying the house, and (d) the indecent familiarities and conversations occurring between the occupants thereof. It is not necessary that the State show that acts of illicit carnal intercourse actually took place in the house.

PROSTITUTION, HOUSE OF: Evidence—Reputation of Inmates—

- 2 **Specific Acts of Misconduct—Harmless Error.** Whether, in a prosecution for keeping a house of prostitution, the reputation of the inmates may be established by evidence of *particular acts, quare*; but when inmates were shown without dispute to be prostitutes, *held* harmless error to permit a witness to testify that he had arrested such inmates for “disorderly conduct.”

Appeal from Webster District Court.—R. M. WRIGHT, Judge.

THURSDAY, DECEMBER 16, 1915.

REHEARING DENIED FRIDAY, APRIL 7, 1916.

THE defendant appeals from a conviction upon charge of keeping a house of ill fame. The material facts are stated in the opinion.—*Affirmed.*

Ernest S. Cary and Oliver Gordon, for appellant.

George Cosson, Attorney General, and John Fletcher, Assistant Attorney General, for the State.

WEAVER, J.—I. The argument on part of appellant is first directed to the question whether there is any substantial evidence of the truth of the charge made in the indictment.

1. **PROSTITUTION, HOUSE OF: corpus delicti: evidence to establish.** That it was a house of bad reputation in this respect among the people in its vicinity is abundantly shown by the testimony of many witnesses; and in so far as this testimony was

disputed, the question so raised was for the jury. That it was resorted to for the purpose of prostitution and lewdness is also shown by the testimony of witnesses whose credibility was also for the jury. It may be true that no witness testifies to acts of illicit carnal intercourse there, but such evidence is not indispensable to sustain a conviction. *State v. Toombs*, 79 Iowa 741; *State v. Porter*, 130 Iowa 690; *Peabody v. State*, 72 Miss. 104; *Graeter v. State* (Ind.), 4 N. E. 461-464. Ordinarily, witnesses cannot be found who will publish their own shame by giving evidence of their participation in such acts; while the very nature of such association implies so much of darkness and secrecy that the enforcement of the law cannot often be accomplished except by the production of convincing circumstantial evidence. This is usually done by showing the immoral character of the persons who live at or resort to the place, the more or less open and indecent familiarities indulged in there between the sexes, the libidinous tone of conversation, and the numerous other manifestations of the want of decent restraint which to common observation quite unmistakeably mark the home or place of sexual vice. It is unnecessary that we mar the pages of our reports by setting out in detail the various acts, habits and customs of the inhabitants and frequenters of the appellant's building, as depicted by the State's evidence. It is enough to say that the testimony is such that, if believed by the jury, no other conclusion than that the house was resorted to for the purposes of prostitution and lewdness could have been reached.

II. Error is assigned and argued upon the admission of testimony given by a policeman that certain girls shown to be visitors or occupants of the house kept by appellant had, on several occasions, been arrested by the witness for disorderly conduct. The circumstances under which the evidence was offered were substantially as follows: On his direct examination, the witness had stated that he

2. PROSTITUTION.
HOUSE OF: evi-
dence: reputa-
tion of inmates:
specific acts of
misconduct:
harmless error.

knew the girls mentioned and that they were public prostitutes. Upon redirect examination, apparently responding to or prompted by something occurring on the cross-examination, the witness was asked whether he had arrested the girls for disorderly conduct, and was allowed to answer in the affirmative, and upon this ruling, a new trial is demanded.

The writer is of the opinion that the evidence was admissible, but the court, without committing itself to that view, is inclined to hold that, conceding the rule to be as counsel contend for, and that the evidence was not legally admissible, its admission was not prejudicial error. The appellant alone was on trial, and the question or answer could at most have only an indirect bearing upon her guilt or innocence. The witness was being interrogated, as we have already said, concerning the character of certain girls who had been named as frequenters of defendant's place, and he, as well as others, had testified unqualifiedly that they were prostitutes. No witness testified that they were not prostitutes or that they were girls of good reputation or character, and the officer's further statement that he had arrested them at different times could add nothing to the damaging effect of the admissible testimony that he had already given.

Other errors are assigned, but the two questions which we have considered are the only ones argued. The case as a whole so clearly justifies the defendant's conviction that a new trial should not be granted merely because of a ruling upon evidence from which it is reasonably certain that no prejudice to defendant could have resulted. The defendant had a fair trial without substantial error, and we cannot properly interfere with the verdict.

The judgment below is—*Affirmed*.

EVANS, C. J., DEEMER and PRESTON, JJ., concur.

STATE OF IOWA EX REL. SHAVER, Appellee, v. IOWA TELEPHONE
COMPANY, Appellant.

TELEGRAPHS AND TELEPHONES: Franchise—Revocability—

- 1 **Reserve Power of State.** A telephone company which, prior to the taking effect of the Code of 1897 (Oct. 1, 1897), erected and operated its telephone equipment upon and along the public highways of the state under authority of § 1324, Code, 1873, as amended by Chap. 104, Acts of the 19th General Assembly, (which, without limitation as to time, authorized it to so do), thereby created contract relations between itself and the state of Iowa, and became possessed, not of a mere revocable license, but of a special franchise in perpetuity—a perpetual right to use such highways for both long distance and local telephone purposes—a right subject to no limitation except the permissible exercise of (a) the *police power* of the state and (b) the *reserve power* then existing in the Constitution and statute laws of the state.

CONSTITUTIONAL LAW: Vested Rights—Perpetual Franchise—

- 2 **Reserved Power to Repeal—Telephones.** WHETHER the statutory declaration that, as to corporations organized under the general incorporation laws of this state, "The articles of incorporation, by-laws, rules and regulations . . . shall, at all times be subject to legislative control and may be, at any time, altered, abridged or set aside by law, and every franchise obtained, used or enjoyed . . . may be regulated, withheld or be subject to conditions imposed upon the enjoyment thereof, whenever the General Assembly shall deem necessary" (§ 1090, Code, 1873; § 1619, Code, 1897), and WHETHER the constitutional power of the General Assembly "to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities . . . and no exclusive privileges, except as in this article provided, shall ever be granted" (§ 12, Art. 8, Const.), CONSTITUTES A RESERVATION OF POWER SO BROAD AND COMPREHENSIVE AS TO CONSTITUTIONALLY JUSTIFY the legislature not only in taking away at pleasure the *corporate* franchise of an Iowa corporation, but also in depriving it of all *special* franchises (for instance, of a previously granted perpetual right to use public highways for a public utility purpose) without compensation, or without otherwise protecting property rights acquired, *quære*.

STATUTES: Construction—Direct Legislative Grant in Perpetuity—

- 3 **Non-Repeal by Subsequent Statutes—Telephones.** The special

franchise in perpetuity to use the public highways for telephone purposes, acquired under specific authority of § 1324, Code, 1873, as amended by Chap. 104, Acts of the 19th General Assembly, was, irrespective of any "reserved power" in the state, NOT FORFEITED OR INTENDED TO BE FORFEITED by the enactment of any of the following statutes, to wit:

1. Chap. 16, Acts 22d G. A. (April 10, 1888), which provided: "Cities shall have power to *regulate* . . . telephone . . . wires and provide the manner in which, and places where, the same shall be placed upon, along or under the streets and alleys of such city."

2. § 775, Code, 1897 (being a substitute amendment of said Chap. 16, Acts 22d G. A.), which provided: "Cities . . . shall have the power to *authorize and regulate* . . . telephone . . . wires and the poles and other supports thereof, by general and uniform regulation and to provide the manner in which, and places where, the same shall be placed upon, along or under the streets . . . of such city . . . and may divide the city into districts for that purpose."

3. § 776, Code, 1897, which provided: "No franchise shall be granted, renewed or extended by any city . . . for the use of its . . . highways . . . for any" telephone purpose, except on vote of the electors of the city.

Held, further, (a) the *regulatory* features of these three statutes applied to *all* special telephone franchises (the right to use the public highways, as distinguished from a *corporate* franchise), howsoever or whensoever obtained, but (b) the *authorization* features—the power of the city to grant such special franchise—had no application to such a franchise already possessed under direct legislative authority from the state, to wit, § 1324, Code, 1873.

WEAVER and PRESTON, JJ., dissent.

STATUTES: Construction—Forfeiture—Prospective or Retrospective

4 Operation—Implied Repeals—Telephone Franchises. Three cardinal principles of statutory construction are:

1. Forfeitures are in disfavor. A statute which is relied on as forfeiting an acquired right (assuming the right to declare such forfeiture) must be so clear as to remove all reasonable doubt as to the legislative intent.

2. A statute, in the absence of an unequivocal intent to the contrary, will be construed prospectively and not retrospectively.

3. Repeals by implication are not favored. So held and applied where it was claimed that a special telephone franchise, acquired under direct statutory grant from the state, had been repealed and forfeited by subsequent statutes enacted under color of certain powers reserved by the state in its Constitution and statutes.

WEAVER and PRESTON, JJ., dissent as to the application made of said principles.

MUNICIPAL CORPORATIONS: Governmental Powers—Telephone
5 **Toll Lines—Regulation.** Whether cities and towns, in view of §§ 775, 776, and 2158, Code, 1897, have power to regulate telephone toll lines within their limits, *quære*.

Appeal from Polk District Court.—C. A. DUDLEY, Judge.

MONDAY, NOVEMBER 1, 1915.

REHEARING DENIED FRIDAY, APRIL 7, 1916.

ACTION to oust defendant company from the streets and highways of the city of Des Moines, because the defendant is without a franchise to operate its local telephone system and exchange in the city, for that the company has not obtained the consent of the city and the electors thereof to use its streets, highways, avenues, alleys and public places, as required by the statutes on the subject. Defendant contends that such consent is not required. A number of defenses were interposed. The demurrer of plaintiff to defendant's answer was sustained. Defendant was found guilty of operating and maintaining a local telephone exchange, and of occupying the streets, avenues, etc., of the city, without lawful authority. A judgment was entered accordingly. Defendant appeals. *Reversed and Remanded.*

Parker, Parrish & Miller, for appellant.

H. W. Byers, E. C. Carlson, and E. N. Steer, for appellee.

DEEMER, J.—It is charged and admitted that the city of Des Moines is a city of the first class. Defendant is a corporation for pecuniary profit, organized in August, 1896, under the laws of Iowa. Its articles of incorporation provide, among other things:

The general nature of the business to be transacted by this corporation shall be the acquiring by purchase, lease or

otherwise, constructing, maintaining and operating telephone plants, both local and long distance, including telephone exchange systems and public and private telephones and telegraph lines. The amount of the authorized capital stock of this corporation shall be the sum of \$10,000,000.

The telephone plant of defendant includes 40 exchanges, located in 32 counties within the state of Iowa, including an exchange in the city of Des Moines, and 8,998 miles of poles, upon which are carried long distance or toll lines, extending through 91 counties in Iowa; its subscribers number 65,000; it affords connections with more than 326,000 connecting stations, being approximately 96 per cent. of the 340,000 telephones within the state of Iowa. Each of defendant's telephones within the city of Des Moines, Iowa, is connected with its long distance wires, and each of said telephones may be and is used for the purpose of communication with points outside of the city of Des Moines. Defendant's telephone lines in the state of Iowa are connected with telephone lines in states other than the state of Iowa, and communication may be had by telephone as far east as New York and as far west as the city of Denver.

The Central Union Telephone Company was, in the year 1881, a foreign corporation, organized under the laws of Illinois, and continued such from 1881 to 1896, with its principal place of business in the city of Chicago. On or about the year 1881, the said Central Union Company, in pursuance of the power and authority granted by Section 1324 of the Code of Iowa of 1873, as amended by Chapter 104, Acts of the Nineteenth General Assembly, commenced to acquire, construct, maintain and operate telephone lines in Iowa, and so continued until about September, 1896; between the years 1881 and 1896, said Central Union Company operated telephone lines extending from Des Moines to Davenport, from Davenport to Burlington, and from Burlington to Keokuk, and from each of said cities to other cities and towns in Iowa; said Central Union Company furnished the public means of

communication by telephone between the cities and towns through and to which its said telephone lines extended, also to the inhabitants of each of said cities and other cities in Iowa, by means of local communication by telephone with the other inhabitants of each of said cities and towns; for the purpose of furnishing said communication, said Central Union Company, during said years, operated in each of the cities before named, and in other cities in the state of Iowa, what were known as local exchanges, by means of which the inhabitants of each of said cities who desired telephone service secured connection with the local exchange, through which they could communicate by telephone with other telephone patrons in the same city and with persons in other cities and towns; the lines and apparatus were used by patrons for communication between all of said cities and towns, as well as local communication. In acquiring, constructing, maintaining and operating its said telephone system, the said Central Union Company occupied the streets, avenues, alleys and other public places of the cities before mentioned, and cities and towns through and to which its lines extended, as well as the country highways connecting said cities and towns, with its poles, wires and other apparatus.

The defendant contends that the said Central Union Company acquired, possessed and owned the right to occupy in perpetuity the streets, avenues, alleys and other public places in the city of Des Moines, as well as in the other cities and towns through and to which its line extended, and the country highways connecting said cities and towns, with its poles, wires and other apparatus, for the purpose of carrying on a telephone business and furnishing to the public means of communication between said cities and towns, as well as local communication between the inhabitants of each of said cities and towns. About September, 1896, the said Central Union Telephone Company, for a valuable consideration, sold, assigned and transferred to this defendant all its telephone property in Iowa. Defendant contends that such transfer includes the

right to occupy in perpetuity the streets, avenues, etc., in all the cities named, and other cities and towns in the state in which it was then operating telephone lines, as well as the country highways extending between said cities and towns, with its poles, wires, etc., for the purpose of carrying on a telephone business. About the date last named, defendant took possession of said telephone property and has since owned and operated the same, and occupied and is now occupying the streets, avenues, etc., of all said cities and towns, and the said country highways, and it has used the streets, highways, etc., for the purpose of carrying on both long distance and local telephone communication.

Section 2158 of the statute, which is the same as Section 1324 of the Code of 1873, was in force when the Central Union Company was organized, except that in 1882, by Chapter 104 of the Acts of the Nineteenth General Assembly, the words "or telephone," in the third line of Section 2158, were added. The Central Union Telephone Company was incorporated in 1881, so that its franchise, in the sense that it had a right to exist and transact business under its articles of incorporation, would date from 1881; but in the sense that it had a franchise, or the right to use the streets, highways, etc., under the grant from the state, it is not so clear from the allegations of the answer that the company commenced to occupy the streets before the amendment of 1882 to Section 2158 of the Code. The allegations are:

"That on or about the year 1881, the said Central Union Telephone Company, in pursuance of the power and authority granted by Section 1324 of the Code of Iowa of 1873, as amended by Chapter 104 of the Acts of the Nineteenth General Assembly, commenced to acquire, construct, maintain and operate," etc.

Section 1619 of the present Code is substantially the same as Section 1090 of the Code of 1873; the effect of the change will be hereafter noted. The defendant has not obtained the consent of the city of Des Moines or the electors therein to

occupy the streets, highways, etc., for its local exchange or system in the city, as required by other sections of the statute subsequently enacted; and it contends that it is not required to do so, because it obtained its authority from the state under prior statutes, and that, by accepting its franchise or right to use the streets, a contract obligation was created, which the legislature has no power to change.

Plaintiff contends that the power which had been reserved under the Constitution and the earlier statutes has been exercised by the enactment of Sections 775 and 776 of the Code of 1897; and that, before defendant may occupy the streets and other places in the city with its wires, poles and other supports, the defendant must obtain the consent of the city and its electors.

II. As already indicated, defendant contends that: (a) A direct grant by the legislature to a public utility corporation to erect its plant upon the highways of the state, upon acceptance by a corporation coming within the terms of the grant, by the erection and operation of its plant, involving an expenditure of money, constitutes a contract between the state and such corporation which, in the absence of reserved power in the legislature in effect at the date of the grant, cannot be impaired by subsequent legislation; (b) any legislation purporting to repeal or impair such grant is in violation of Section 10 of Article I of the Constitution of the United States and Section 1 of Article XIV of the Amendments to that Constitution, and also in violation of Sections 1 and 21 of Article I of the Constitution of the state of Iowa; (c) neither by Section 12 of Article 8 of the Constitution of Iowa nor by Section 1090 of the Code of 1873 (Section 1619 of the Code of 1897) has power been reserved in the legislature to repeal a legislative grant, under the circumstances set forth. Even if the legislature has reserved the power to repeal the grant to telephone companies, under the provisions of Section 1324 of the Code of 1873, as amended, no such right has been

1. **TELEGRAPHS
AND TELE-
PHONES:** fran-
chise: revoca-
bility: reserve
power of state.

in fact exercised by the enactment of Sections 775 and 776 of the Code of 1897.

These contentions present the main propositions in the case. At the outset, it must be conceded that, under our previous holdings, the defendant, in virtue of Section 1324 of the Code of 1873, as amended by Chapter 104 of the Acts of the Nineteenth General Assembly, acquired the right to occupy the streets and alleys of the city of Des Moines with its poles and wires, for the purpose of conducting a telephone business. *Chamberlain v. Telephone Co.*, 119 Iowa 619; *State v. Nebraska Telephone Co.*, 127 Iowa 194.

In the *Chamberlain* case, *supra*, it is said:

“Whatever rights telegraph companies were given by the original act were conferred upon telephone companies by Chapter 104 of the Laws of the Nineteenth General Assembly. It matters not whether telegraph companies made a limited use of the streets and alleys of cities or not. They were not so limited by the law, and this was well known. It was also known by all that the principal business of telephone companies was confined to urban ways. True, they had then used rural ways, to a limited extent, and it may have been apparent to the legislature that the rural service would be extended, and the long distance phone finally become one of the great public conveniences and necessities which it now is. But notwithstanding this, they were given the use of highways and streets without limitation, and without control by city authorities. If the legislature had intended to limit their use of the streets to long distance service, it would doubtless have done so by the use of apt words. That such was not its intention is further manifest from the fact that, prior to the amendatory act in question, this court had practically held that the words ‘telegraph companies,’ as used in the statute, included ‘telephone companies.’ ”

In the *Nebraska Telephone Co.* case, *supra*, we said:

“Section 1324 of the Code of 1873, as amended by Chapter 104, page 100, of the Laws of the Nineteenth General

Assembly, gave to any person or company the right to construct a telegraph or telephone line along the public highways of the state; and, under the authority so given, the defendant had the right to occupy the streets and alleys of the city, as well as the rural highways or roads. *Chamberlain v. Iowa Telephone Co.*, 119 Iowa 619; *State v. City of Red Lodge* (Mont.), 76 Pac. 758. In the Code of 1897, the words 'public roads' are used in the place of the words 'public highways,' used in the former statutes; and, as we understand the appellant's argument, it is claimed that the change limits the defendant's right in the streets of the city to those actually occupied by it prior thereto. Whether the change was intended to distinguish between streets and rural ways, we need not determine; for whatever the intent as to that, it is apparent that the change was not intended to, and does not, limit or affect the right of those who accepted and acted upon the grant given by the former statutes. The grant to use the streets was without limitation as to territory, and under its authority, there can be no question as to the right to extend the service to meet the demands of the public. The very nature of the business demands the use of many streets, and may demand the use of every street in the city; and this was doubtless contemplated by the legislature when the unlimited grant was made. *Chamberlain v. Telephone Co.*, *supra*; *Duluth v. Duluth Telephone Co.*, 84 Minn. 486 (87 N. W. 1127). True it is that the acceptance of the grant may limit its operation; but, in the absence of an acceptance which does so, it must be presumed, from the nature of the business and the preparation made therefor, that the acceptance of the grant and the privileges thereunder was as broad as the grant itself, and included the right to extend the service as required by public necessity. *Duluth v. Duluth T. Co.*, *supra*; *Michigan Telephone Co. v. City of Benton Harbor*, 121 Mich. 512 (80 N. W. 386, 47 L. R. A. 104)."

While these holdings are challenged, and we are asked to recede therefrom, a re-examination of the question in the

light of the arguments now made confirms us in the conclusion that they are right, and that they are amply fortified by a long line of decisions rendered both before and after their pronouncement. See *City of Duluth v. Duluth Tel. Co.* (Minn.), 87 N. W. 1127; *Wisconsin Tel. Co. v. Oshkosh* (Wis.), 21 N. W. 828; *State v. Central New Jersey Telephone Co.* (N. J.), 21 Atl. 460; *State v. Milwaukee* (Wis.), 113 N. W. 40; *Michigan Tel. Co. v. City of Benton Harbor* (Mich.), 80 N. W. 386; *City of Wichita v. Missouri & K. Tel. Co.* (Kas.), 78 Pac. 886; *City v. Southwestern Telegraph & Telephone Co.* (Tex.), 106 S. W. 915, 917; *State v. City of Red Lodge* (Mont.), 76 Pac. 758; *City v. Old Colony Trust Co.*, 132 Fed. 641. That this statute, as amended, constituted a grant to the telephone company, which, upon acceptance, became a contract between the state and the telephone company, is also well settled by authority. *Russell v. Sebastian*, 233 U. S. 195; *New York Line v. Empire Subway Co.*, 235 U. S. 179; *Walla Walla v. Walla Walla Co.*, 172 U. S. 1, 19; *City of Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U. S. 58.

At the time the defendant accepted the grant, neither the city of Des Moines nor any other municipality in the state had power to grant a franchise to any telegraph or telephone company to occupy or use any of its streets or alleys. This was a power which the legislature, the seat of all authority in the matter down to that time, reserved to itself; although it may be granted that, in the exercise of its police power, the city, before any authority was given it, as well as after it had been given, might exercise such power in a regulatory manner. The original grant by the legislature, being unlimited as to time, gave to whoever might accept the grant a special franchise in perpetuity, subject only to a proper exercise of the police power and to any expressly reserved power. *City of Louisville v. Cumberland Co.*, 224 U. S. 649; *Detroit v. Detroit R. Co.*, 184 U. S. 368; *Owensboro v. Cumberland Tel. Co.*, 230 U. S. 58; *Town of New Decatur v. American Tel. & Tel. Co.* (Ala.), 58 So. 613; *Blair v. Chicago*, 201 U. S. 400; *City of*

Seattle v. Columbia & P. S. R. Co. (Wash.), 33 Pac. 1048;
Suburban Electric Co. v. East Orange (N. J.), 41 Atl. 865.

In the *Owensboro* case, *supra*, the court said:

"That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right has been too many times decided by this court to need more than a reference to some of the later cases . . . As a property right, it was assignable, taxable and alienable. Generally, it is an asset of great value to such utility companies, and a principal basis for credit. The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the city making the grant. . . . If there be authority to make the grant, and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct, and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights. To quote from a most weighty writer upon municipal corporations, in approving of the decision in *People v. O'Brien*, *supra*, a decision accepted and approved by this court in *Detroit v. Detroit Street Railway*, *supra*, 'The grant to the railway company may or may not have been improvident on the part of the municipality, but having been made, and the rights of innocent investors and of third parties as creditors

and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly when the construction adopted by the court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the court correctly held, under the legislation and facts, that the right created by the grant of the franchise was perpetual, and not for a limited term only.' Dillon on Mun. Corp. (5th Ed.), Sec. 1265."

In the *Seattle* case, we find this language:

"Property rights acquired under and by virtue of a franchise thus granted are perpetual, unless otherwise limited in the grant; and there was no limit in this instance, and such franchises are not void in consequence thereof. There is no sound reason why a municipal corporation may not bind itself in this particular, as well as an individual may. On the contrary, well recognized principles of justice require that it should be so bound, to the end that property rights may be made stable and certain, and the municipality is sufficiently protected under such circumstances; for should it become necessary to thereafter undo the work and terminate the rights granted, and to take the property of the corporation acquired in pursuance and by virtue thereof, it may do so under the exercise of the power of eminent domain upon making compensation; and this is a sufficient protection for the rights of the city, and one which, at the same time, affords protection to the rights of the respondents."

That the legislature granted a special franchise to the defendant, rather than a mere revocable license, should, we think, be conceded; but that this grant was at all times subject to regulation and control, either by the city or the state, in the proper exercise of the police power, should also be conceded; for neither could bargain away this power, and all property, whether held by a person or corporation, is subject at all times to regulation and control under the police power,

and at times subject even to destruction under this power. It is also subject to taxation, and to the right of the state to take it, in the exercise of the power of eminent domain.

A corporation itself, under the reserved power found in the Constitution, to which we shall hereafter refer, is not only subject to regulation, but its charter, which is its very life,

may be repealed at the discretion of the legislature. If, in this connection, it be conceded that the acts which it is claimed forfeited defendant's rights were not in the exercise of

2. CONSTITUTIONAL LAW:
vested rights:
perpetual franchise:
reserved power to repeal:
telephones.

the police power of either the state or the city, what was done must be said to have been in the exercise of the reserved power of the state; and reliance is placed upon Sec. 1090 of the Code of 1873 (Sec. 1619 of the Code of 1897), and Sec. 12 of Article 8 of the Constitution. The former reads as follows:

"The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control and may be at any time altered, abridged, or set aside by law, and every franchise obtained, used or enjoyed by such corporation, may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for public good."

The constitutional provision reads:

"Subject to the provisions of this article, the general assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities . . . ; and no exclusive privileges, except as in this article provided, shall ever be granted."

Counsel for plaintiff make the broad claim that, under the power reserved in these written laws, which were in force when defendant took advantage of the legislative grant, the legislature not only had the right to amend or repeal all laws

for the organization or creation of corporations,—that is, to take away at pleasure their corporate franchises,—but also had plenary power to deprive them of all special franchises or grants, without making compensation or otherwise protecting their property rights acquired under such grants. On the other hand, it is contended for the defendant that this reserved power, assuming it to be as broad as contended for by plaintiff, must be limited to the corporate charter, or the right to do business at all; and as applied to special franchises, such as the right to use streets and alleys with poles and wires, this reserved power is subject to other Federal constitutional provisions, such as that the obligations of contracts shall not be impaired, or anyone deprived of his property without due process of law. Exhaustive and learned arguments are made in support of each of these contentions, but it is manifest that, unless we find that the legislature did in fact attempt to deprive defendant of its grant, and to forfeit its franchises or privileges to use the streets and alleys of the city, the questions presented are moot ones, which we should not decide before they actually arise.

This brings us down to what we regard as the crucial point in the case: Did the legislature attempt to deprive the defendant of rights theretofore given it under the statute with its amendment? The original statute, as amended, reads as follows:

3. STATUTES: CONSTRUCTION: DIRECT LEGISLATIVE GRANT IN PERPETUITY: NON-REPEAL BY SUBSEQUENT STATUTES: TELEPHONES.

“Any person or company may construct a telegraph or telephone line along the public highways of this state or across the rivers or over any lands belonging to the state or to any private individual, and may erect the necessary fixtures therefor; provided that when any highway along which said line has been constructed shall be changed, said person or company shall, upon ninety days’ notice in writing, remove said line to said highway as established. Said notice contemplated herein may be served on any agent or operator in the employ

of said person or company." McClain's Code of 1888, Sec. 2103.

This is the statute which was construed in the *Chamberlain* and *Nebraska Telephone* cases, *supra*. The act which it is claimed deprived defendant of its rights to use the streets and alleys is Chapter 16, Acts of the Twenty-second General Assembly, passed in the year 1888, reading as follows:

Cities shall have power "to regulate telegraph, telephone, electric light, district telegraph and other electric wires, and provide the manner in which and places where the same shall be placed upon, along or under the streets and alleys of such city."

This was amended by the legislature which passed the Code of 1897, so as to make it read as follows:

"Cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway and other electric wires, and the poles and other supports thereof, by general and uniform regulation, and to provide the manner in which, and places where, the same shall be placed upon, along or under the streets, roads, avenues, alleys and public places of such city or town, and may divide the city into districts for that purpose." Sec. 775, Code, 1897.

The same legislature passed what is known as Section 776 of the Code of 1897, reading as follows:

"No franchise shall be granted, renewed or extended by any city or town for the use of its streets, highways, avenues, alleys or public places, for any of the purposes named in the preceding section, unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election. The council may order the question of granting, renewal or extension of any franchise submitted to a vote at a general election, or at one specially called for that purpose; or the mayor shall submit said question to such vote upon the petition of twenty-five property owners of each ward in a city, or fifty property owners in any incorporated town."

This last quoted section has been amended by the thirty-second and thirty-third general assemblies, but these amend-

ments are not material to this controversy. No change was made in what was theretofore known as Section 1324 of the Code, as amended by the nineteenth general assembly, except to substitute for the words "public highways" and "highways," the words "public roads" and "roads."

The Code Commission, in recommending the change found in Section 775 of the Code of 1897, makes this report:

"In order to include poles as well as wires, and street railway, as well as other electric wires, also to require regulations to be uniform and impartial, this section as reported should be changed to read as follows: 'Cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway, and other electric wires, and the poles and other supports thereof by general and uniform regulation, and to provide the manner in which and places where the same shall be placed upon, along, or under the streets, roads, avenues, alleys, and public places of such city or town, and may divide the city or town into districts for that purpose.' "

Section 776 seems to have emanated from the legislature itself, and the referendum vote therein referred to was new. Theretofore, the only public utilities subject to such a vote were water and gas works, electric light and electric power plants. The change made in Section 1324 of the Code of 1873 was manifestly to harmonize it with the statutes just quoted, with reference to the powers of cities and towns over telephone and telegraph companies.

Now, the primary question in the case is whether or not, by the enactment of these laws, commencing with the acts passed in the year 1888 and ending with those appearing in the Code of 1897, the legislature intended to

4. STATUTES: construction: forfeiture: prospective or retrospective operation: implied repeals: telephone franchises.

forfeit rights already acquired by a telephone company under Section 1324 of the Code of 1873, as amended by the Acts of the Nineteenth General Assembly, and to require such a company, already occupying the streets and

alleys of a city, to secure, through action of the city council and by a referendum vote, the right to use the streets and alleys upon which it had already placed its poles and lines, under specific authority from the legislature. Or was it the intent of the legislature to authorize cities to regulate such companies as were already using the streets and alleys under grant of the legislature, and all others which might secure the right to so use the streets and alleys, by general and uniform legislation applicable to all, and to further provide that no franchise to use the streets and alleys should thereafter be granted, renewed or extended, except upon a referendum vote of the people? It seems clear to us that the latter is the proper interpretation to be put upon these laws. It must be remembered that the franchise spoken of is not the general franchise of a corporation, domestic or otherwise, granted by a sovereign, but a franchise for the use of the streets, alleys, etc., of the city. The latter, the defendant had directly from the legislature; and, as we have seen, it was perpetual in character, subject to forfeiture, if at all, only by the legislature itself. It did not need to be renewed or extended, and as i had one already, no further grant was necessary.

Several well-settled rules are to be considered, in determining this main proposition: First, forfeitures are not favored, and legislative enactments of that character are strictly construed. *In re Kuhn's Estate*, 125 Iowa 449; *Salters v. Tobias*, 3 Paige Ch. (N. Y.) 338; *Smith v. Spooner*, 3 Pick. (Mass.) 229; *Sullivan v. Park*, 33 Me. 438; *Russell v. University*, 1 Wheat. (U. S.) 432; Endlich on Interpretation of Statutes, Sec. 343. Again, repeals by implication are not favored. Endlich on Interpretation of Statutes, Sec. 210; *Casey v. Harned*, 5 Iowa 1; *Burke v. Jeffries*, 20 Iowa 145; *Lambe v. McCormick*, 116 Iowa 169; *Diver v. Keokuk Savings Bank*, 126 Iowa 691. Another well-settled canon of construction is that statutes should be construed prospectively, and not retrospectively; and this is true although there be no constitutional impediment. *State v. Hays*, 52 Mo. 578; *Smith v. Humphrey*, 20

Mich. 398; *Furney v. Ackerman*, 21 Wis. 268; *Forsyth v. Ripley*, 2 G. Greene 181; *City of Davenport v. D. & St. P. R. Co.*, 37 Iowa 624; *Kennedy v. Des Moines*, 84 Iowa 187; *Farmers Co. v. Iowa State Ins. Co.*, 112 Iowa 608; *Galusha v. Wendt*, 114 Iowa 597; *Davis v. O'Ferrall*, 4 G. Greene 168; *Rosier v. Hale*, 10 Iowa 470; *Bartruff v. Remey*, 15 Iowa 257; *Purczell v. Smidt*, 21 Iowa 540; *Payne v. Chicago, B. I. & P. R. Co.*, 44 Iowa 236.

In the *Davenport* case, *supra*, it is said:

"It is also a well-established rule of the courts to construe all statutes as having only a prospective operation, unless the legislature expressly declare, or otherwise show a clear intent that it shall have a retroactive effect."

And in the *Galusha* case, it is said:

"There can be no controversy about the proposition that the court will construe a statute as prospective only, in the absence of language indicating an intention that it shall be retrospective."

In *Cameron v. United States*, 231 U. S. 710, it is said:

"A retrospective operation of statutes is not to be given except in clear cases, unequivocally evidencing the legislative intent to that effect. *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U. S. 190, 199, and previous cases. . . . *Summers v. United States*, 231 U. S. 92. In the absence of a clearly expressed legislative intent to the contrary, the court will presume that the law-making power is acting for the future, and does not intend to impair obligations incurred or rights relied upon in the past conduct of men when other legislation was in force. *White v. United States*, 191 U. S. 545, 552."

Turning again to Sections 775 and 776 of the Code of 1897, and considering the language used, in the light of these rules, it is apparent, we think, that the legislature did not intend to, nor did it in fact, forfeit the defendant's grant, or franchise, acquired under Section 1324 of the Code of 1873, as amended. There is no declaration of forfeiture; and a repeal

of this section, as amended, so as to affect companies which have vested rights thereunder, is not to be implied. Moreover, there is nothing to indicate that it is to affect companies already having rights upon the streets and alleys of the city, save in a regulatory manner. Section 775 clearly has reference to the regulation of telephone, telegraph, street railway and other electric wires, poles and other supports, by general and uniform rules, and it also provides that, for this purpose, the city may be divided into districts. At the time of the passage of that act, there were many street railways operating under charters from the city, and many telegraph lines running through the cities of the state. Surely, this statute did not affect the rights of such companies to use the streets of a city; and it is clear that their franchises then in existence were not forfeited thereby. The intent of the law was manifestly to give the city power, not only to authorize companies having no franchises, but also those which did, to use the streets and alleys for poles, wires, etc., under general and uniform regulations, and this it might do by dividing the city into districts. This undoubtedly had reference to the placing of the poles, supports and wires upon the property of the city, and doubtless included the right to compel telegraph and telephone companies already established to place their wires in underground conduits or in alleys, rather than in streets. The fact that the regulations must be general and uniform, at least by districts, is a clear intimation that they were not intended to apply to the granting of franchises or the right to occupy the streets and alleys. No city could, under this section, grant such a franchise, for the plain reason that the next section prohibits it, except upon a referendum vote. There is no provision in this latter section that all franchises or grants to new companies shall be uniform in their terms. Uniformity is only required in the matter of placing poles, wires and supports upon the streets, alleys and public places. If this be not the correct construction, then all franchises or grants to street

railway, telegraph and telephone companies must be general and uniform. Surely, the legislature did not intend to so tie the hands of the city authorities that they could not bargain for better terms, after once granting a franchise for the use of streets for the purpose mentioned. Moreover, giving the term "authorize" its broadest significance, there is nothing to indicate that it was to have other than a prospective operation. If a company was already authorized to use the streets and alleys of a city by legislative grant, it needed no authorization from the city; and the word itself suggests prior lack of authority. It does not, when standing alone, refer to the past or to the present, but to the future. One already authorized to do a thing needs no further authority. It is the one who does not possess it who needs the grant. Having the grant, the word "authorize" does not suggest that it be taken away. Given a prospective operation, as we think it should be, it has reference to the regulation of those companies which might then have, or thereafter be given, the right to occupy the streets; and the fundamental thought is regulation in the method of placing wires, poles, etc., upon the city streets, alleys, and public grounds. The next section clearly indicates that companies already having a franchise or grant need not secure a new one; for it says in terms that no franchise shall be granted, renewed or extended, etc., for any of the purposes named in the preceding section, without a vote of the people. This means that no such franchise shall in the future be granted, renewed or extended without a vote of the people. Unless, then, defendant's franchise, acquired under general legislative grant, was forfeited by Section 775 or by some other act, it needed no other; for it had one which, as we have seen, was perpetual, and subject only to the powers already enumerated. Its franchise did not have to be renewed or extended, in order to give it life. Under the doctrine of the *Chamberlain* and *Nebraska* cases, *supra*, the defendant had a franchise to use the streets and alleys of the city of Des Moines, and it has it yet, unless the legislature has caused the

forfeiture of the same. As forfeitures are not favored, any act which is relied upon as taking away a franchise must be so clear as to remove all reasonable doubt as to the legislative intent. There was no repeal of the statute which granted the franchise. True, it was amended, but this amendment was prospective in its operation, and at best was intended to have application to the future only. The most that can be claimed for the amendment of what was Section 1324 is that, after the passage of the amendment, cities and towns should have the right to authorize and regulate telephone, telegraph and street railway and other electric poles, wires and supports, etc., within their limits.

There may be some doubt, in construing Sections 775, 776, and 2158 together, whether cities and towns may now regulate toll lines within their limits. It may be that the state still retains its right to do this, under Section 2158.

5. MUNICIPAL COR- Perhaps no grant from the city is necessary to
PORATIONS: obtain the right to erect a toll line within the
governmental powers: tele- limits of the city; and it may be that, after
phone toll lines: regulation. obtaining a grant from the state, the city may
still regulate the placing of the poles, wires, etc., for toll lines within its limits, by general and uniform regulation applying to all toll lines alike. Upon this and other propositions, we express no opinion, as it is not necessary to a decision of the case.

Plaintiff relies upon the recent cases of *East Boyer Telephone Co. v. Incorporated Town of Vail*, 166 Iowa 226, and *Farmers Telephone Co. v. Washta*, 157 Iowa 447. But in neither of these cases had the telephone company acquired a franchise prior to the enactment of Sections 775 and 776, or the amendment to Section 1324 of the Code of 1873 by the Code of 1897. In neither case did the telephone company involved have any right in the streets of the respective towns under Section 1324 of the Code of 1873, as amended by the Acts of the Nineteenth General Assembly. Sections 775 and 776 were, in these cases, given a prospective operation, as they

should have been; and no such questions arose in those cases as are here involved.

Lastly, it is contended that, at most, all that defendant is entitled to is the right to maintain its toll lines within the city, and that it has not, and never had, the right from the legislature to maintain a local exchange within the city of Des Moines. This proposition is predicated upon the thought that, under Section 1324 of the Code of 1873, as amended by the nineteenth general assembly, the legislature gave defendant no other right than to construct and maintain toll lines upon the public highway of the state, which included streets and alleys, and that there was no provision for the maintenance of local exchanges until the adoption of the Code of 1897, which contains Sections 775 and 776 practically as they now stand. Some support for this contention is claimed to be found in *City of Brownwood v. Brown Telephone & Telegraph Co.* (Tex.), 157 S. W. 1163, and *Athens Co. v. Athens* (Tex.), 163 S. W. 371. As we read these, neither is in point. In each, the law was substantially the same as that found in the Code of 1897, to which we have referred, and towns were given substantially the same rights as found in Section 775 of the Code. From the *Brownwood* case, we quote the following:

“It will be observed that the grant to such corporations by Article 1231 is qualified by this important language: ‘In such manner as not to incommode the public in the use of such road, streets and waters.’ The effect of the limiting clause is to declare the right of the public to be superior to the rights granted to the corporation. Article 1235, Revised Statutes, 1911, reads: ‘The corporate authorities of any city, town or village through which the line of any telegraph corporation is to pass may, by ordinance or otherwise, specify where the posts, piers or abutments shall be located, the kind of posts that shall be used, the height at which the wires shall be run; and such company shall be governed by the regulations thus prescribed; and, after the erection of said telegraph lines, the corporate authorities of any city, town or village

shall have power to direct any alteration in the erection or location of said posts, piers or abutments, and also in the height at which the wires shall run, having first given such company or its agents opportunity to be heard in regard to such alteration.' It is apparent that the right of the telephone company to pass through the city or town, over and upon its streets, is absolute, and a city has no authority to deny that right. The interest of the public in convenient service by such means of communication is the basis of the grant, and is superior to any private interest. On the other hand, the interest of the city in the manner in which the corporation exercises its right is the foundation of the authority vested in the city to control the occupancy and use of the streets by such corporations, and a reasonable exercise of the power is equally absolute. The limitation embodied in the grant to the corporation would alone be sufficient to subject it to a reasonable restraint. But the grant to the authorities of the city by Article 1235 invests the municipal government with power to enforce any reasonable regulations as to the use of the streets by the city, but such city cannot use its power to regulate in such manner as to deny the corporation the right to pass through the town, and in so doing, to use the streets in 'such way as not to incommode the public.' . . . But the city had no authority to require the telephone company to accept its ordinances as a condition precedent to entering the city. The right and duty of the city was to enforce such ordinances as prescribed reasonable regulations, whether acceptable to the telephone company or not. . . . The telephone company will be authorized to construct its line over the streets of the city, under and in accordance with the reasonable requirements of the city. The effect of the injunction will not be to take from the city its right of control over its streets, sidewalks,—in fact, all public places in the city. The telephone company is entitled to all the privileges necessary to its construction and operation as a 'distance telephone.' But it is not to be inferred from this opinion that

this company can, without consent of the city, transact the business of a local company. Our conclusions have been reached by applying to the long distance telephone the rules of law which would be applicable to the telegraph line under similar conditions, and we expressly reserve from any implication the relative rights of local telephone companies and city governments. Nor do we intend to imply any limitation upon the authority of a city in the regulation of placing of poles, etc., or placing wires underground, when necessary to avoid 'incommoding' the public. We deem it proper to limit this opinion to the class of cases to which this belongs." *City of Brownwood v. Brown Telegraph & Telephone Co.*, 157 S. W. 1165, 1166.

In the *Athens* case, it is said:

"Thus it will be seen that the issue here raised in no sense involves the rights of a distance telephone business, as distinguished from those of a local telephone business, as construed in *S. A. & A. P. R. Co. v. S. W. T. & T. Co.*, 93 Tex. 313 (55 S. W. 117, 49 L. R. A. 459, 77 Am. St. Rep. 884), and the *City of Brownwood v. Brown Telegraph & Telephone Co.* (Sup.), 157 S. W. 1163, where it was, in effect, held that, under Article 1231, R. S. 1911, distance telegraph and telephone companies might pass through towns and villages, using their streets so as not to incommode the public, free from interference by the government of said towns and villages, despite the provisions of Article 1235, which only invests the municipality with power to enforce reasonable regulations in such use of its streets by distance telegraph and telephone companies. The facts in this case show appellant is conducting a local telephone business, and that a different rule with reference to the rights of such companies pertains in law is made clear by Mr. Chief Justice Brown, in the *Brownwood* case, *supra*, by the statement in the opinion that 'it is not to be inferred from this opinion that this company can, without consent of the city, transact the business of a local company.' Concluding, then, from the facts, that appellant was conduct-

ing a local telephone business, and that appellee was free to regulate and control the same in a lawful manner, and that the appellant held the business subject to such regulation, the question then arises, did appellant take the business subject to the terms of the original grant?" *Athens Telephone Co. v. City of Athens*, 163 S. W. 371.

These authorities will be helpful when a case arises under the law as it now stands, and we are asked to decide the rights of a telephone company authorized to erect toll lines over and upon rural highways and city streets under Section 2158 of the Code, and its right to maintain local exchanges under Sections 775 and 776 of the Code. They do support our conclusion as to the effect of Section 775 standing alone, and, on the whole, are authorities for the views herein expressed. Under the general grant found in Section 1324 of the Code as amended, defendant acquired the right to use all the streets and alleys in the city of Des Moines, and they were not deprived of that right by Section 775 of the Code. The city might, under that section, in the exercise of its police or regulatory powers, provide as to how the poles, wires, etc., should be constructed; but it could not arbitrarily exclude the defendant from the use of its streets and alleys. This point is expressly ruled by both the *Chamberlain* and *Nebraska Telephone* cases, *supra*, as will be observed from the quotations made therefrom. In this connection, we may with profit also quote the following, in addition to the extract already taken from the *Chamberlain* case:

"The twenty-second general assembly, by Chapter I of its Acts, provided for a board of public works in all cities of the first class having a population of more than 30,000, and further provided: 'It shall have power and be required by and with the advice of the city engineer to superintend the laying of all water, gas and steam heating mains and all connections therefor, and laying of telephone, telegraph, district telegraph, and electric wires, in the manner provided by the ordinances of such city.' And by Chapter 16 of its Acts, it gave additional

powers to certain cities; among others, the power 'to regulate telephone, telegraph, electric light, district telegraph, and other electric wires, and provide the manner in which and the places where the same shall be placed, upon, along or under the streets and alleys of such cities.' It can hardly be seriously argued that the quoted language from these two acts does not relate to the use of streets and alleys by telegraph and telephone companies; and, if the acts do relate to that matter, they must be taken into consideration in construing the telegraph and telephone statute; for it is a rule of universal application that several statutes relating to the same thing must be so considered. . . . If the telephone right of way statute did not confer the power to use streets in cities, the legislature would not have given cities control over the location of the poles and wires. When, however, the statutes are construed together, they are in perfect accord."

This quotation serves a dual purpose: First, to demonstrate that Section 1324 of the Code of 1873, as amended by the Acts of the Nineteenth General Assembly, gave the defendant the right to use all the streets and alleys of the city of Des Moines; and second, to show that, in its original form, Section 775 of the Code was a mere regulatory statute, and that the change made on the suggestion of the Code Commission, as found in the Code of 1897, was not for the purpose of forfeiting any rights of telephone companies, but to give to cities and towns the right "to include poles as well as wires, and street railway as well as other electric wires; also, to require *regulations* to be uniform and impartial." Nothing said in *Farmers Telephone Co. v. Washtia*, 157 Iowa 447, or *East Boyer Telephone Co. v. Incorporated Town of Vail*, 166 Iowa 226, runs counter to these views. On the contrary, they are in entire harmony with the conclusions here reached. In both cases, the telephone companies were attempting to enter cities or towns after the enactment of Sections 775 and 776, and to erect and maintain local exchanges therein. We may with profit quote the

following from *Farmers Telephone Co. v. Washta*, 157 Iowa 455-458.

“What may be the limit if any, of legislative power, throwing open all public streets and highways to the exploitation of works of real or alleged public utility, without franchise or permission from cities or towns affected by them, we need not here discuss. We may, for the purposes of this case, assume that, under Section 780 of the Code of 1851 and its subsequent re-enactments, prior to the enactment of Sections 775 and 776 of the Code of 1897, the builders of telegraph and telephone lines could rightfully erect their poles and string their wires on every street and alley in each and all of the cities and towns of the state, without regard to the wishes of the several municipalities; but we are satisfied that such power, if it existed, was materially narrowed by the later Code provisions to which we have made reference. The authority given by Section 780 of the Code of 1851 and subsequent re-enactments thereof prescribe undoubtedly the general rule; but it is a rule from the operation of which cities and towns have been excepted or removed by the later legislation embodied in Sections 775 and 776 of the present Code. By the first of these, cities and towns, are empowered to ‘authorize’ the use of their streets for such purposes, and by the second, the grant of such franchise is made subject to the ratification of the voters of the municipality. To say now that, notwithstanding this statute, the streets of such municipality are open to the entrance of every person or corporation which may be minded to try its hand at the maintenance of a telephone system, without permission of the constituted authorities or the approval of the voters, is to nullify the legislative enactment. On the other hand, by treating Code Section 2158 as stating a general rule, which must be read and applied with due reference to limitations imposed by other statutes relating to the same subject, all may be given due effect.

“The case of *Chamberlain v. Telephone Co.*, 119 Iowa 619,

on which appellants place much reliance, is not here a controlling authority. The telephone line or system there in controversy had been erected, and the rights of the company had vested, under a general statute substantially identical with the present Code Section 2158. This was, however, prior to the enactment found in Code Sections 775 and 776, and the effect of these provisions and the authority and power thereby vested in cities and towns was in no manner discussed or considered. The one thing there considered was the construction of the general statute, authorizing persons and corporations to erect telegraph and telephone lines on all the public highways of the state; and it was held that the words 'public highways' necessarily included city streets, and that the telephone company's rights there were, therefore, not referable to any grant or franchise from the city. With the correctness of that decision upon the issue as there made, we have here no quarrel. What we hold is that the legislature, having now expressly clothed the cities and towns of the state with power to authorize the use of its streets for such purposes, or, in other words, to grant franchises to telephone companies, and having further made the validity of such grants dependent upon their ratification by popular vote, it follows of necessity that a city or town, acting through its constituted authorities, may exclude from its streets the poles and wires of any company or system to which such permission has not been extended. It will not do to say that the extent of the authority given to cities and towns is merely to regulate, and not to authorize or prohibit; for, while it might be possible to torture that meaning out of Code Section 775, if it stood alone, it would leave the succeeding section utterly pointless and of no effect.

"It is to be conceded that cases may be found, and they are cited by counsel, in which statutes, more or less similar to our own, have been shorn of their apparent effect, and construed as giving cities and towns no more than a power of supervision or regulation. The thought which seems to have influenced these holdings, and which is pressed upon our atten-

tion in appellant's brief, is that, where the state—the repository of the sovereign power—has by general statute given telephone and other similar corporations the right to occupy the public highways with their poles and wires, it cannot be presumed that the legislature intended to confer upon cities and towns the right or power to exclude them from their corporate limits. We do not regard the reasoning by which this conclusion is reached as convincing or persuasive. It is safe rule to assume that the legislature means what it clearly says. The state may and does delegate certain of its powers to municipal corporations, and if, in its judgment, such corporations can best or most effectually control, improve and protect the streets within their limits, and statutes to that effect are duly enacted, we know of no restriction in the Constitution or in principles of public policy which should impel the courts to construe away their obvious meaning. It was entirely competent for the legislature to restrict the scope of the right or privilege which had been conferred by Code Section 2158, and this we think it did, by the provisions of the later statute."

We reach the satisfactory conclusion that the defendant has a franchise to operate its telephone system, both long distance and local, upon the streets of the city of Des Moines, and that this franchise has not been repealed or taken away by the legislature. Defendant is doubtless subject to certain regulatory or police measures, is subject to taxation and to the right of eminent domain; but its franchise has not been forfeited by the legislature, and it should not be ousted from the streets, alleys and public places of the city of Des Moines.

The judgment must, therefore, be and it is reversed, and the cause remanded for a judgment and decree in harmony with this opinion. *Reversed and Remanded.*

All the justices concur, except Weaver and Preston, JJ., who dissent.

WEAVER, J. (dissenting)—I desire to register my dissent from the foregoing opinion, not merely on account of the result

reached in this particular case, but because of the far-reaching evil effect which I am convinced will follow our approval of the doctrines which that opinion affirms. At the outset, I desire frankly to admit that if this court desires to re-affirm and further extend the doctrine of *Chamberlain v. Telephone Co.* and *State v. Nebraska Telephone Co.*, cited by the majority, there is a logical fitness in the reasoning employed by them, unless we are to accord to the effect of the power reserved to the state by our Constitution and statutes greater force and efficiency than my colleagues are disposed to allow. Personally, I believe the view expressed in those cases, to the effect that Section 1324 of the Code of 1873 and its amendments gave every telegraph and telephone company an unlimited privilege to enter upon and occupy every public road and public highway in the open country and every street and alley in every city and town within our state borders without the consent of the local authorities and without compensation, is radically unsound, and I would waste no time in receding therefrom. The language of the statute does not, in my judgment, necessitate such construction, and if the terms of the grant or privilege be in any respect doubtful or open to construction, the doubt should be resolved in favor of the public, as against the person or persons who desire to exploit the opportunity for private profit. But for the purposes of this discussion, I shall assume that those decisions are to stand, and are as binding upon me as upon the majority, until they are overruled, and that they are to be given due effect upon all questions settled therein. What do they settle? Simply this: That, under the terms of the statute cited, the telephone company has the right to make use of the streets of the city without asking the city's consent, and that, having done so, the city, as the law stood prior to 1897, had no power or authority to exclude it therefrom. What the court there says relative to the issues decided is not to be ignored or disregarded by us; but, in so far as its discussion goes beyond those issues, it is dictum which constitutes no authoritative precedent. Those cases do not construe

or determine the effect of the constitutional restriction (Constitution of Iowa, Article 8, Section 12), or of the statute (Code of 1873, Section 1090, identical with Code of 1897, Section 1619), or the later statutes (Code of 1897, Sections 775 and 776), and these provisions are now subject to our examination and construction, unaffected and unembarrassed by what we said or failed to say in the *Chamberlain* case or the *Nebraska Telephone* case.

Let it then be assumed, as said by the majority, that the statute first mentioned, Section 1324 of the Code of 1873, and its amendments, having been accepted by the telephone company by entering upon the city streets and erecting its poles and wires thereon, constituted a contract between the state and the company which the courts are bound to recognize and enforce: what were the terms of the contract, and how long was it to remain effective?

It is a proposition as sound in law as it is obvious to good sense that the law existing at the time the contract was made became, by implication, a part of the agreement; or, stated otherwise, it is presumed that the parties entered into their agreement with reference to the law bearing upon the subject concerning which that agreement was made. Now the principle that a charter to a corporation is a contract protected to the same extent as are agreements between individuals, by the constitutional prohibition of laws impairing the obligation of contracts, thereby making the creature greater than its creator; endowing it with everlasting life, and leaving the public helpless to escape the blighting effects of improvident perpetual grants of corporate privileges, had hardly been settled by the Supreme Court of the United States, in the famous Dartmouth College case, before its inevitably evil effects began to make themselves so manifest that the several states began to take action to hedge it about with statutory and constitutional restrictions. These generally took the form of a reservation of power in the state to limit the existence of corporations thereafter organized, to regulate their business in the public

interest and to withdraw special privileges conferred upon them. That purpose found expression in our own Constitution, where it is provided that:

"The general assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities . . . ; and no exclusive privileges, except as in this article provided, shall ever be granted."

Later, another step in the same direction was taken by the legislature, when it enacted Section 1090 of the Code of 1873 (Section 1619 of the Code of 1897), further providing, as part of the general law for the organization of corporations for pecuniary profit, that the articles of incorporation, by-laws, rules and regulations of any corporation thereafter organized should "at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

These provisions of the Constitution and the statute were in force when the telephone company in this case came into existence and when it acquired all the contract rights which it has in the premises, and the rights so acquired are unquestionably subject to all the expressed reservations in favor of the state. In other words, the contract was made with the condition and understanding that the exercise of the powers so acquired was subject to legislative control, and that every franchise obtained, used or enjoyed under or by virtue of that contract might lawfully be regulated or withheld, or be made subject to further conditions imposed upon its enjoyment, according as the legislature in its wisdom should believe to be for the public good. Still further, such contract must have been made with the understanding that if, by its terms, the corporation acquired any special privileges or immunities, they were to be held or retained only so long as the legislature saw

fit to permit it, and that the grant so made was always subject to amendment or repeal, as provided by the cited constitutional provision. If, then, when the corporation has had 30 years of presumably profitable free use of the public streets upon such conditions, it happens that the legislature, in view, possibly, of the increased population, increased congestion of the streets, and improved methods of serving the public convenience, concludes in good faith that it will be for the public good to withdraw the privileges granted to the corporation, or to impose certain conditions upon their further enjoyment, who is wronged? Is not this precisely what the parties agreed upon? If the "innocent investors and third persons" who, in every struggle of this character, are waiting in the anteroom ready to be paraded as a shield of corporate privilege against the demands of public right, raise the familiar cry, it is easy to demonstrate its lack of substantial foundation. Just as the original incorporators entered upon the original enterprise with knowledge of the reserved power in the state to protect itself and the general public by withdrawing the privilege or by imposing new conditions thereon, so did they who invested in its securities, and they suffer neither legal nor moral wrong when the state sees fit to exercise its rights.

The contract which the law implies in the grant of a statutory privilege ought to have some of the elements of mutual obligation which enter into contracts in general; but assuredly, the obligation to which we hold the state in this case is supported by only the flimsiest consideration on the other side. When the statute making the grant was passed, no person or corporation was under any duty to take advantage of it. Having undertaken to establish a telephone system in the city or state, defendant was under no promise to continue the enterprise, but could retire therefrom at any time, on any pretext, without incurring any liability for damages. It pays no rent for the use of the streets, no license or occupation tax. It is free to quit the field and wash its hands of any obligations to the state or city, as if the contract had never

been made. The sole concession or consideration (if it may be so called) accorded to the state is the right to protect the interests of the public by the exercise of the reserve power to which we have adverted; and the value of that reserved power ought not to be minimized or its purpose frustrated by resolving every doubt against it.

Coming, then, to our present Code Sections 775 and 776, it is to be observed that, while the origin of the first section may be traced in prior legislation, it was, in its present form, coupled with the succeeding section, and they were together enacted as parts of the same chapter of the Code, wherein the legislature sought to embody all the statute law relating to the use and occupation of the city streets and the rules for their supervision and control. Then, as now, the streets of many of our cities and towns were occupied by telephone lines, the number of corporations being organized for such enterprises was rapidly multiplying, and the question of their proper regulation and control was an important one. This was the situation the statute was enacted to meet, and to appreciate its effect, the two sections must be read together. Thus viewing it, the majority reach the conclusion that the legislature meant, in Section 775, to grant power to cities and towns to regulate the matter of poles and wires of all telephone companies, including those organized before, as well as those organized after, the date of the act; but that, in Section 776, the necessity of obtaining a franchise for the use of the streets was laid only upon those companies which might thereafter enter the business. While this exposition of Section 775 is somewhat narrower than I would make it, I would not take the time of the court to dissent therefrom, if this were all that the opinion holds. But to say that the legislature had in mind *all* telephone corporations when it enacted Section 775, but had reference to a *part* only, when it enacted the next section, is a conclusion to which I cannot agree. Though the origin of the first section is, as already said, traceable through some earlier legislation, and the next section was then for the first

time brought into the statute, they were here coupled together and enacted as a part of the same chapter, and I fail to understand by what rule of construction or interpretation the same general language is to be given the broader meaning in one place and the narrower effect in the other. The opinion as written divides public utility corporations of this kind into two classes: those which had been organized and had secured a foothold in the state, and those which might thereafter seek the right to use the streets for a like purpose. Had the classification been intended, it was easy to use plain words of unmis-takeable meaning for such purpose, and not leave this important distinction to be discovered and developed by mere construction. To me, it is inconceivable that an intelligent legislature, engaged in the work of recasting and simplifying the statute law of the state and putting it in form to be understood and enforced, should fail to make itself clear on this point, if any such distinction had been intended. Again, if the statute be capable of a reasonable construction which will make it valid, it will be assumed that such was the legislative intent, as against another construction, which would render it invalid. To adopt the idea expressed by the majority is to say that the legislature intended to separate the telephone corporations of the state, all organized under the same statute and carrying on precisely the same kind of business, into two classes, to one of which are given special privileges denied to the other, and upon the other, are imposed disabilities and burdens of which the first is relieved. This, in my judgment, is forbidden by our own state Constitution, Article 1, Section 6, as well as by the last clause of Section 12 of Article 8 of the same instrument, which, in clear terms, inhibits the granting of exclusive privileges to any citizen or class of citizens. Up to that time, the legislature had not attempted in terms to subject telephone corporations to any control by cities or towns, an omission which served to hamper these municipalities in the proper care and maintenance of their streets and

to prevent the proper regulation of such companies with reference to the public convenience. The necessity and propriety of such regulation was just as patent, and the relief thus afforded to cities and towns was just as necessary, with respect to companies already organized and doing business, as to those which might thereafter be brought into being. The whole subject was before the legislature, and, under the reserved power to which we have referred, it was clothed with all necessary authority to treat all telephone companies alike, and subject all to like conditions. That it could impose conditions precedent to the authority of corporations thereafter organized to do business will not be doubted, and that it could also impose the same conditions precedent to the continued enjoyment of a franchise already in existence is expressly provided in Code of 1873, Section 1090, which, as we have seen, became a part of the contract which is here relied upon by the defendant. Having, then, the necessary authority to place all corporations doing or desiring to do a telephone business upon the same level, and to condition their right to establish or continue such business upon the same terms, the legislature enacted the Code of 1897, Sections 775 and 776, and used terms of general character which may fairly be construed as applying to all such corporations; and in my judgment, the court ought to give it that effect. Such effect, the majority first seeks to avoid by pointing to the words, "No franchise shall be granted, renewed or extended by any city or town," except in the manner named. It is argued that defendant already had a franchise, and therefore needed no grant or renewal to give it a right to use the streets; and that, the franchise being perpetual, the defendant is not to be placed in the attitude of asking an extension thereof. In the first place, let us remember that a franchise which is subject to repeal or amendment is not perpetual, in any proper sense of the word. Its term of existence is, at most, indefinite, and is subject to termination at any time, at the will of the state, constitutionally expressed. It seems apparent that "extended" is here used in the sense of "con-

tinued," and that the phrase "granted, renewed or extended," in the connection where it is found, is, in effect, a legislative declaration that thenceforth the use of the streets of cities and towns by these public service corporations should be acquired or continued only by consent of the constituted authorities and vote of the people. But the majority argue: (1) That to hold the statute applicable to defendant is to work a forfeiture, and that forfeitures are not favored by the law; (2) that to make such application gives to the statute retrospective effect; (3) that it would be an unconstitutional impairment of the obligation of the contract implied in the original grant and its acceptance, and an unauthorized interference with vested rights. With the utmost respect to my colleagues who differ with me, I insist with all confidence that, of the several legal rules and principles thus invoked in the opinion, not one is applicable to this case.

1. As to forfeiture. To construe the law as I have indicated and give it effect against the defendant is neither to declare nor to enforce a forfeiture. The defendant is made to forfeit nothing. A forfeiture is a taking away or divesting of property or property rights, because of some default or offense. *Union Glass Co. v. First Nat. Bank*, 10 Pa. Co. Ct. R. 565,572. It relates to loss of property or right because of something its owner has done or omitted to do. *Cassell v. Crothers*, 193 Pa. 359. A forfeiture is a penalty. *Gosselink v. Campbell*, 4 Iowa 296, 300. It is a deprivation or destruction of a right in consequence of a non-performance of some obligation or condition. *Webster v. Dwelling House Ins. Co.*, 53 O. St. 558.

The last definition, stated by the Ohio court, is probably as apt and complete as can be found anywhere, and accords perfectly with the ordinary employment of the word by lawyers and courts. A moment's reflection will make it plain that there is nothing of that nature in this case. It is not claimed by plaintiff that defendant has, by its failure, default or misconduct, forfeited or lost any right it had in the prem-

ises. No forfeiture has been declared, and none is now urged. The position taken is—and it is impregnable—that the power to impose a new or additional condition upon the use of the streets was reserved in the original contract, and that such power and such only has been exercised, not to punish or take advantage of the defendant for any default, but to impose other conditions upon the enjoyment of the franchise which are believed to be for the public benefit and in strict accordance with the contract. The reservation of such power by the statute and the Constitution, though not expressed or repeated in the grant itself, was, nevertheless, as much a part of the contract as if it had been so expressed. *Tomlinson v. Jessup*, 82 U. S. 454. After holding that the reserved power justified the state in afterwards withdrawing a valuable privilege attached to the franchise, the court, in the cited case, notices the objection made concerning its ill effects upon the interests of persons investing in the corporate stock, and dismisses the objection by saying that the original incorporators and subsequent stockholders took their interests with knowledge of the existence of this power and the possibility of its being exercised at any time, in the discretion of the legislature. Further, as to the reserved power, the court says that these provisions “constituted the condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made. They were as much a part of the charter as if incorporated into them.” And this is true whether the reservation be made in the Constitution or in an existing general law enacted by the legislature. *Miller v. State*, 82 U. S. 478; *Macon & B. R. Co. v. Gibson*, 85 Ga. 1, 15; *Western N. C. R. Co. v. Rollins*, 82 N. C. 523, 529. In none of the very numerous cases treating of the exercise of the power reserved by the state to repeal the grant or to alter its terms will there be found any suggestion that its application serves to work a forfeiture.

2. The point that to hold this statute applicable to defendant is to give it retroactive effect rests upon a misap-

prehension as to when a statute is retroactive and subject to the rules cited by the majority. Turning to the books, we find that the Supreme Court of the United States has defined the term as follows:

"A retrospective law is one which changes or injuriously affects a present right by going behind it and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued." *Poole v. Fleeger*, 36 U. S. 185.

It has also been defined as one that relates back to and gives to a previous transaction some different legal effect from that which it had when it happened. *State v. Whittlesey*, 17 Wash. 447. Again, it is said to be one intended to affect transactions which occurred or rights which accrued before it became operative as such, and ascribes to them effects not inherent in their language in view of the law in force at the time of their occurrence. *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549.

Under no definition here given or any other I have been able to discover can Code Sections 775 or 776 be said to have retroactive effect, if given the interpretation asked by the plaintiff. This statute applies only to conditions then existing and such as might thereafter arise. The effectiveness of the act does not reach back beyond the day when it was duly passed, approved, and published. The legislature could not, of course, impose liability upon the defendant for failure in the past to discharge a duty which had not been previously imposed upon it, nor is anything of that kind implied in the statute as I am reading it. Nor—to get still closer to the point of this issue—could the legislature impose upon the defendant's enjoyment of its franchise any new burden not within the scope of its reserved power. It does, indeed, impose a new condition, but that is precisely what its contract in express words allows it to do. To keep that matter clear, let me again repeat that clause of the reservation (Code Section 1619):

"And every franchise obtained, used or enjoyed by such corporation may be regulated, withheld, or be subject to con-

ditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

To require the defendant, as an additional condition of the enjoyment of its franchise, to conform to the law imposed upon other corporations of its kind is, therefore, strictly within the terms of the agreement. The condition has no retroactive effect, but has reference solely to the future use of such franchise.

Perhaps it is as well that we here take notice of a proposition which seems to be glanced at in the majority opinion and distinctly announced in a few decisions by other courts—quite notably in *Iowa Telephone Co. v. Keokuk*, 226 Fed. 82—to the effect that powers reserved to the state by the constitutional and statutory reservations to which I have referred have reference only to the franchise or right to be a corporation, and not to the franchises or contract rights which such corporation may obtain or acquire in carrying out the purposes of its organization. In the case referred to, after noting the distinction between a franchise to exist as a corporation and a franchise subsequently acquired by contract with or grant from a city or town, the court proceeds to say:

"The provisions of the Code and the Constitution, as aforesaid, clearly have reference to the powers granted to a corporation, and have no relation to the property rights of a corporation acquired under such powers. The corporation being a creature of statute, the legislature expressly reserved the right to change the powers granted and to take away such powers at any time. This reservation authorized the state to even dissolve a corporation and destroy all its functions; but even this would in no manner affect property rights acquired by it before its dissolution or destruction."

Going still further in this direction, it is declared that, while the state may thus dissolve the corporation itself, and the franchise to exist in such capacity may be lawfully destroyed, the acquired franchise obtained by the corporation in its lifetime "continues unimpaired." In other words, no

matter what changes the passing years may bring in conditions of public service or public convenience, no matter that a franchise granted by a city to a corporation under the easy-going policy of pioneer days proves in later practice to be a clog upon municipal progress and oppressively burdensome upon the people intended to be served, the state has rendered itself impotent to do more than to cancel the corporate charter, leaving the franchise itself, the one thing from which relief is needed, "unimpaired," to hang as an unbreakable iron ring welded about the public neck until the "heavens shall pass away and the elements shall melt with fervent heat." Indeed, when that great cataclysm shall occur, I am not at all certain that legal ingenuity will not rise to the occasion and announce some solemn formula to render that ring infusible in the final conflagration. Justice to my colleagues at this point requires me to admit that they endeavor to limit their discussion to the proposition that the legislature has not in fact attempted to exercise its reserved power and to withhold any opinion upon the extent of that power until a case shall arise which, in their judgment, properly presents it. But believing, as I do, that Code Section 776 does embody a purpose to give effect to that power, I cannot refrain from going into the subject more generally than does the opinion. Moreover, while cheerfully assuming that such is not the intention of the majority, I am convinced that the logical and inevitable trend of the opinion is so strongly towards the proposition affirmed by the Federal court in the *Keokuk* case as to foreclose its free consideration when a case comes before us which confessedly does raise the point. In this belief, and in the conviction that the adoption of the theory of that case into the law of this state would be little less than calamitous, I find justification for this dissent.

Before leaving the subject, it is proper to recall the rule that the courts of the state are vested with final authority upon the construction and interpretation of its own statutes, and to note that this court has already put a construction upon our statutory reservation of power with respect to corporations,

wholly at variance with that set forth in the *Keokuk* case. *Sioux City Street R. Co. v. Sioux City*, 78 Iowa 742. There, the railway company obtained the grant of a franchise from the city. By the terms of the grant, whenever the city undertook to pave any street occupied by the railway company, it was required to pave the space between its rails, and no more. Later, and after the franchise had been accepted, a statute was enacted by the legislature authorizing cities to require street railway companies to pave, not only the space between the rails, but an additional space of one foot on either side. This statute, let it be noticed, was general in its terms, and, as in Section 776 of the Code, nothing was said differentiating between corporations obtaining grants before its enactment and those thereafter obtaining them. Thereafter, the city, undertaking to pave certain streets, assessed against the company the expense of paving the space between the rails and one foot outside thereof, as provided by the statute, and the company took the matter into the courts, denying its liability and advancing the same reasons therefor which are relied upon by the defendant in this case. The trial court ruling in favor of the city, an appeal was taken to this court, where it was argued that, the grant of the franchise having been accepted, it had the force of a contract, the obligation of which neither the state nor the city could impair by imposing upon the company new or additional burdens. Overruling the point, the court referred to Code Section 1619, which we have already quoted, and said:

“The state reserved the power *not only to repeal or amend* the articles of incorporation of such corporations as should be organized after its enactment, but to *impose such conditions upon the enjoyment of the franchises obtained thereunder* as the general assembly might deem necessary for the public good. Plaintiff’s franchise consists of the privileges, powers and rights conferred upon it by the general statutes and its articles of incorporation, but it assumed them *subject to the right and power reserved to the state by the statute*. The reserva-

tion was a condition of the grant. Now the object of plaintiff's organization was to construct, maintain and operate street railways and other railways in the city and adjacent thereto. *The power and privilege of doing that particular thing are its franchise.* The act of the twentieth general assembly, as applicable to it, imposes it *as a condition upon which it may enjoy that franchise* that, when the city determines that the street shall be paved, it shall bear the cost of paving between its rails and one foot in width outside of them. That the general assembly had the power under the reservation to impose the condition, we think *there can be no doubt.*"

The distinguished writer of that opinion, Reed, J., is still living; and if the precedent so established shall have its proper effect to save the state and its municipalities from the thrall-dom with which the other theory threatens them, he may congratulate himself upon his title to the gratitude of the people whose service he has honored. Appeal from that decision was taken to the Supreme Court of the United States and there affirmed (138 U. S. 98). The point was there distinctly made that the ordinance or contract between the city and the company was neither part of the articles of incorporation nor of its by-laws, rules or regulations, and that it was not a franchise, within the meaning of the statutory reservation of power. This contention, which is the identical proposition affirmed in the *Keokuk* case, was distinctly disapproved. The court says:

"The company took its franchise subject to such legislation as the state might enact. This is plain from the provision of Section 1090 of the Code (Section 1619 of the present Code). . . . The legislature had the power *not only* to repeal and amend the articles of incorporation of the company, but *to impose any conditions* upon the enjoyment of its franchise which the general assembly might deem necessary for the public good. The reservation of this power was a *condition of the grant.*"

Again, the court says:

"*The right to operate the railway in the streets is a fran-*

chise obtained through the power given to the city by the state, but the state reserved the power to regulate *such franchise and impose conditions upon it.*"

Finally the court says—and to this I call special attention, because of its direct bearing on the further suggestion in the majority opinion that to give the statute force as I construe it is to find ourselves at variance with the constitutional provision against impairing the obligation of contracts:

"No question can arise as to the impairment of the obligation of a contract, when the company accepted all of its corporate powers subject to the reserved power of the state to modify its charter and to impose additional burdens upon the enjoyment of its franchise."

This ruling, which obviates the objection that my construction of the statute would work an unconstitutional impairment of the contract, is so direct and authoritative that further argument along that line is unnecessary. That objection being removed or overruled takes with it the further assertion of "vested rights." The corporation has no rights which are so vested as to be immune against the proper exercise of the state's reserved power. It has, of course, the right to acquire and accumulate property, of which neither state nor city can deprive it, save as follows: If, as may well happen with respect to some species of corporate property, the proper exercise of the reserved power of the state operates to destroy or diminish its value, or interfere with its profitable use, it is *damnum absque injuria*; for, the right of the state so to do being provided for in the contract, the resultant injury is not a wrong. But, so far as the corporation has or acquires property or rights which are beyond the sphere or scope of the powers reserved by the state, they are protected as sacredly and by the same guaranties as are those of a natural person. Under our law, therefore, the right of a corporation to hold and enjoy a public franchise by grant from a city or town is a right obtained and held subject to the control of the state, and its enjoyment is subject to such additional conditions as the

state may, in its wisdom, from time to time place upon it. The subject is thoroughly considered in *Greenwood v. Freight Co.*, 105 U. S. 13 (26 L. Ed. 961). There, a street railway corporation known as the Marginal Company obtained by act of the legislature the grant of a franchise to construct and operate a railway upon the streets of Boston. The grant was accepted and certain lines of the railway constructed. Five years later, another railway company was, by a similar act, authorized to construct another railway along and upon the same streets, and to condemn for such use the railway of the first company. The validity of the last grant was contested in the courts, on the ground of its alleged interference with the rights which had vested under the original grant. The case having reached the Federal court of last resort, the second grant, which wholly destroyed the franchise of the original company, was held to be a valid exercise of the power reserved to the state to amend or repeal the act of incorporation. Speaking of the effect of the repeal of a corporate charter, the court says:

“One obvious effect is that it (the corporation) no longer exists. Its life is at an end. Whatever force the law may give to transactions into which the corporation entered, and which were authorized by the charter while in force, it can originate no new transactions dependent upon the power conferred by the charter. . . . Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses of action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal. . . . It results from this view that, whatever right remained in the Marginal Company to its rolling stock, its horses, its harness, its stables, the debts due it, and the funds on hand, if any, it no longer had the right to run its cars through the streets, or any of the streets, of Boston. . . . Whether this action was oppressive or unjust, in view of the public good, or whether the legislature was governed by sufficient reason in thus repeal-

ing the charter of one company and in chartering another,
... is not, as we have seen, a judicial question in this case."

So the Massachusetts court, after upholding the right of the state to create a corporation and reserve the right to control it, says that the legislature may "grant absolutely or on condition; so they may grant during pleasure, or until a certain event happens. And if a grant be accepted on the terms prescribed, it becomes a compact, and the grantees can have no reason to complain of the execution of their own contract." *Crease v. Babcock*, 23 Pick. (Mass.) 334, 342. See, also, *McLaren v. Pennington*, 1 Paige Ch. (N. Y.) 102, 107.

A corporation was chartered in the state of Maine in the year 1833, when a general statute was in existence, reserving to the state the right to repeal or amend the charter. In 1839, another general statute was enacted, charging stockholders in corporations chartered after 1831 with personal liability for corporate debts. The company thereafter contracted a debt which the creditor undertook to enforce against one of the stockholders. His right to do so was sustained on the theory that placing this additional burden upon the stockholders was within the reserved power of the state. The court adds this pertinent remark:

"If the corporators were not satisfied with their individual liabilities, they had it in their power to cease incurring them." *Stanley v. Stanley*, 26 Me. 191.

So, too, this court, in an early period of its history, replying to the complaint that the exercise of the reserved power was a hardship upon the corporation and possibly destructive of its property, said:

"If the corporation have suffered from the undue exercise of such power, they have only to censure themselves for the folly of accepting the grant upon the terms specified." *Miners' Bank v. United States*, 1 G. Greene 553, 563.

This case is cited in our recent case, *State v. Des Moines City R. Co.*, 159 Iowa 259. The opinion in the latter case,

written by Deemer, J., discusses very thoroughly and convincingly several principles having an important bearing upon the case in hand, and may be studied with profit.

To recapitulate: The reserve power in the state to impose upon defendant the duty of compliance with the same terms which are required of all other telephone companies is clear and ample; the general terms of Code Section 776 are broad and general enough to include the defendant, and, as a matter of even-handed justice, it should be so applied; to thus enforce it neither impairs the obligation of the contract implied in the grant nor interferes with any vested rights; and it neither declares nor works a forfeiture; nor does it have any retrospective effect. It is the wise policy of this state to grant no exclusive rights, and to place upon a common level of right and of opportunity before the law all persons pursuing the same lawful business, and to grant no special public privileges which are not terminable whenever the state, acting through its proper authorities, shall find such action promotive of the public good.

For the reasons stated, I dissent from the opinion expressed by the majority, and would affirm the judgment below.

PRESTON, J. (dissenting.)—I also dissent. In my opinion, the reserved power exists, as contended for by appellee, and that question is in the case for determination. I concur in Justice Weaver's conclusion that, by Sections 775 and 776 of the Code, the legislature has exercised the power. I would affirm.

GEORGE A. STEELE, Appellant, v. MRS. S. M. INGRAHAM,
Appellee.

EVIDENCE: Parol Evidence—Contradicting Date of Maturity of
1 Promissory Note. The date of maturity of a promissory note may not be contradicted by evidence of an oral conversation prior to the signing of the note.

TRIAL: Instruction to Jury—Duty of Jury to Obey. The instructions constitute the law of the case for the jury, and a judgment on a verdict contrary to the instructions will be reversed.

BILLS AND NOTES: Consideration—Failure of Consideration. An entire failure of consideration for a note defeats the note as to one against whom such plea is available. *Held*, evidence insufficient to sustain a verdict finding such failure of consideration.

Appeal from Polk District Court.—LAWRENCE DE GRAFF,
Judge.

SATURDAY, DECEMBER 18, 1915.

REHEARING DENIED FRIDAY, APRIL 7, 1916.

ACTION on promissory note resulted in verdict and judgment thereon for defendant. The plaintiff appeals.—*Reversed*.

A. L. Steele, for appellant.

Fred F. Keithley and *J. G. Myerly*, for appellee.

LADD, J.—The defendant exchanged a tract of land in Kansas for a farm in Iowa. Therein W. W. Cornwell acted as her agent. She gave him the note of \$175, payable one year after date, in part at least for services so rendered. As the note was transferred after maturity, the defenses pleaded were quite as available as though Cornwell had sued. The defendant alleged, in an amendment to the answer:

“Cornwell obtained said note from defendant, and as a consideration therefor, the said Cornwell agreed to put in writing his said agreement that he would sell said land for the defendant within a year for \$80 per acre, or rent said land on or before the 1st of March, 1913, to a responsible tenant for five years, at the annual rental of \$3.50 per acre, and that said note should become due and payable only when he had performed said agreements.”

If such an agreement there was, it was not reduced to writing. The original answer averred that the consideration

had failed and that defendant was compelled to rent at a lower rate and to sell the land at a sacrifice. The issue of fraud and evidence bearing thereon were withdrawn from the jury.

The burden of proof was on the defendant, and to sustain the averment of the answer, she testified that she was reluctant about making the deal; that Cornwell urged her to exchange,

1. EVIDENCE: parol evidence: contradicting date of maturity of promissory note.

saying that, if she did so, he would either rent the farm for her "for five years at \$3.50 per acre or I will sell it for you in one year if you will give me the exclusive right to do this;" that after some negotiations the deal was made, she relying on said promise; that thereafter she said to him, in substance, that, as she was getting no money, she could not pay any commission then, and he responded, "That don't make any difference about commission;" he could wait for same "until he sold the farm." A day or two later, she gave the note payable one year after date, there being no conversation at the time, save as to the amount and his agreement to reduce his promise to writing. She testified further that she did not own the Iowa land at the time of the trial. This is all the evidence favorable to plaintiff bearing on the issues.

1. In the fifth instruction, the jury was directed to ascertain whether, as an inducement of exchange, Cornwell undertook to sell the farm at \$80 an acre within one year, or rent same for five years at a rental of \$3.50 an acre, and, further, whether at such a time he agreed that said note should become due and payable only when he had done so, exacting an affirmative finding as to both to warrant a verdict for defendant. There was no competent evidence of any agreement as to when the note became due, save that found in the note. The answer admitted the making and delivery of the note. What Cornwell said related only to the time of payment of the commission. When the note was executed, a day or two later, the time of payment was inserted therein, "12 months after date." This would be after the lapse of the year in which Cornwell

is said to have stated that he would sell the farm. The parties having definitely agreed in writing as to time of payment, the terms of the note might not be varied by the evidence of the previous conversation, in which a different time of payment was proposed. In other words, an oral understanding, had a day or two before the execution of a written agreement on the same subject-matter, is merged therein, and may not be proved over an objection that it tends to vary the terms of a written instrument.

2. In the sixth instruction, the jury was told that, in order to find for defendant, it must appear by a "preponderance of the evidence that the defendant had given the said Cornwell one full year from and after the 22d

2. TRIAL: instruction to jury: duty of jury to obey.

day of June, A. D. 1912, in which to make sale of said land, or had given him until March 1, 1913, to rent the same for \$3.50 per acre.

And if defendant has failed to satisfy you by a preponderance of the evidence that she retained the land for at least one year, giving said Cornwell the right to sell or rent the said land under the terms and conditions contained in said alleged contract, then plaintiff is entitled to recover as prayed in his petition."

The record is silent as to when defendant parted with the Iowa farm, and, had this instruction been followed by the jury, the verdict must have been for the plaintiff.

3. The evidence tended to show that Cornwell, in order to induce the defendant to exchange the Kansas land for an Iowa farm, promised that, if the exchange were made, he would

3. BILLS AND NOTES: consideration: failure of consideration.

sell the Iowa farm for \$80 an acre within one year or rent the same at \$3.50 an acre for five years, and that he would reduce such agreement to writing; and that she executed the

note in consideration of such agreement, as well as his services in making the exchange, and this issue would rightly have been submitted to the jury had there been any evidence that Cornwell was given the exclusive sale of the land for one year in

addition to the showing of failure to sell or rent the same. Because there was not sufficient evidence to support the verdict, and because of the errors in the instructions, the judgment is—*Reversed*.

DEEMER, GAYNOR and SALINGER, JJ., concur.

J. R. WILLEY, Appellant, v. C. G. HITE et al., Appellees.

FRAUDULENT CONVEYANCES: Husband to Wife—Joint Accu-
1 **mulations.** Evidence reviewed, and held to show (a) that the claim of the wife that she owned the proceeds used in buying the land in question was unfounded, (b) that said proceeds were the result of the joint efforts of husband and wife, and, the land being deeded to them jointly, they each owned an undivided half thereof.

ESTOPPEL: Wife's Property in Husband's Name—Credit Extended
2 **to Husband.** A wife who permits her husband to take conveyance of her property in his own name—who thereby permits and invites the world to look upon and treat him as the owner, and thereby enables him to secure a false credit—is estopped to assert her ownership against the one deceived.

FRAUDULENT CONVEYANCES: Fraudulent Conveyance Which
3 **Does Not Defraud—Setting Aside—Husband and Wife.** A conveyance of land, *fraudulent in fact*, will not be set aside at the instance of a creditor, when the land is already so heavily encumbered that no possible equity remained for the creditor intended to be defrauded.

DEEMER, J., dissents.

PRINCIPLE APPLIED: A husband and wife both owned an undivided half of the land. The husband, with intent to defraud his creditor and with his wife's connivance, deeded his half to her. The homestead right had never been set off. At the time of the fraudulent conveyance the land (106½ acres) was already mortgaged for \$5,480. The *entire* tract was worth \$10,650. The 40 acres for homestead, with buildings, were worth \$7,000. The 66½ acres, without the homestead 40, were worth about \$3,650. Of course the wife already owned, in her own right, one half of the 66½ acres. *Held*, the fraudulent conveyance did not, in fact, injure or hinder the creditor, and the conveyance would not be set aside.

Appeal from Carroll District Court.—F. M. POWERS, Judge.

THURSDAY, NOVEMBER 5, 1914.

REHEARING DENIED FRIDAY, APRIL 7, 1916.

ACTION to set aside certain conveyances claimed to have been made to defraud creditors.—*Affirmed.*

W. C. Saul and B. I. Salinger, for appellant.

Brown McCrary and George G. Bowen, for appellees.

GAYNOR, J.—On March 6, 1908, the defendants herein, C. G. Hite and M. E. Hite, his wife, purchased the land in controversy from one Joseph D. Osborne, and a deed therefor was executed to them jointly, and duly filed for record on March 12, 1908. On the 22d day of February, 1910, C. G. Hite became indebted to the plaintiff upon certain promissory notes.

1. FRAUDULENT
CONVEYANCES:
husband to
wife: joint ac-
cumulations.

These notes became due February, 1911, and thereafter, on the 25th day of March, 1911, suit was brought upon them against C. G. Hite and others, and all defendants in that suit answered April 17, 1911. On the 18th day of October, 1911, judgment was entered against the defendant C. G. Hite for the full amount of said notes and costs. On the 22d day of April, 1911, C. G. Hite conveyed his interest in said property, by warranty deed, to his wife, M. E. Hite, conveying therein to her an undivided half interest in the land in controversy. On the 13th day of October, 1911, the defendant M. E. Hite, her husband joining therein, conveyed all of said land to the defendant William Bowyer. The land in controversy contains 106½ acres. At the time of the conveyance from C. G. Hite to his wife, M. E. Hite, the same was conveyed to her subject to a mortgage of \$5,480. The plaintiff claims that the deed made from C. G. Hite to his wife, M. E. Hite, of an undivided one-half interest in the land in controversy, and the deed made by M. E. Hite to William Bowyer, were made

for the purpose of hindering, delaying and defrauding plaintiff in the collection of his judgment, and he brings this action to set aside those conveyances, and to subject an undivided one-half interest in the land theretofore owned by C. G. Hite to the payment of said judgment. It appears that the defendants C. G. and M. E. Hite had occupied some portion of this 106 acres as a homestead for three or four years prior to the making of these conveyances, but the homestead had never been set off or marked as such, nor was any portion of said premises set apart as a homestead at the time that this suit was commenced. The defendants herein filed separate answers. Each of the defendants deny each and every allegation of plaintiff's petition, and deny any intention to defraud the plaintiff in the making of the conveyances complained of. The Hites in their answers claim that the purchase money of the premises in question was furnished by the defendant M. E. Hite, and that without her knowledge or consent the deed of conveyance was made by Osborne in the name of both of the defendants, instead of in the name of the wife, and that the same was an error or mistake; that thereafter C. G. Hite agreed with his wife to convey the legal title of the entire premises to her. They both claim that they have lived upon these premises, in a house situated thereon, for more than four years last past; that this was their only home and homestead. They claim that they had a valid and existing homestead right therein long prior to the time that the debt was created on which judgment was rendered; that the purpose in making the deed to William Bowyer was to purchase another homestead; that the defendant C. G. Hite had a claim and homestead right in said premises at all times. The defendant Bowyer, answering the petition, denies any intention to defraud; affirms the matters set up in the answer of the other defendants and alleges that he knew of the homestead character of the land; knew the same was encumbered; knew that C. G. Hite was in poor health and should be relieved from the burden of carrying on the work of the farm; that he paid

a valuable consideration therefor in good faith; that he knew nothing of plaintiff's claim at the time that he took said conveyance. The plaintiff for reply says that, in extending the credit which made the debt on which the judgment herein sought to be enforced was rendered, the plaintiff relied upon the apparent ownership of said land in controversy, and that C. G. Hite was the owner of an undivided half interest therein, and that he extended credit to C. G. Hite in reliance thereon, and that the Hites, by permitting the same to appear of record in the name of both, are now estopped from denying that C. G. Hite was the owner of an undivided half interest therein. Upon the issues thus tendered, the court rendered judgment for the defendants, dismissing plaintiff's petition, and from this judgment, the plaintiff appeals.

It appears that the consideration named in the deed from Osborne to these defendants was \$6,000; that the deed was made subject to a mortgage of \$4,500. It appears that this deed was made on March 6, 1908, and conveyed the land to C. G. and M. E. Hite jointly. It appears that prior to the purchase of this land, the defendants C. G. and M. E. Hite owned certain land in Calhoun County; that the record title to it was in them jointly; that they sold this Calhoun County land, and received therefor about \$3,000. It appears that \$500 was paid down at the time of the purchase of the land in question from Osborne, leaving \$1,000 to be paid; that the \$1,000 was later paid by check made by the defendant C. G. Hite; that the check for \$1,000 was signed by C. G. Hite; that both joined in the mortgage which was given to secure the balance. Defendants claim, however, that this money paid belonged to M. E. Hite. As to the Calhoun farm, they make the same claim that they make here, that, while the deed was in the name of both jointly, M. E. owned the entire property, and the proceeds that came from the sale of it. The explanation as to how she became the owner of the Calhoun County farm might convince an exceedingly credulous mind, but will not stand the test of judicial analysis. It appears from the

evidence that they had very little property when they purchased the Calhoun farm. It appears that the transaction which resulted in the purchase of the Calhoun farm was carried on entirely by C. G. Hite; that the draft for the first payment was sent by C. G. It is claimed that the contract for the Calhoun farm was made in the wife's name. The contract is not produced. The defendants claim that it had been burned or destroyed in some way, but the deed was made to them jointly. It appears that prior to, or at the time that they bought the Calhoun land, they were living on a rented farm in Carroll County. That was 13 years prior to the time that this action was tried.

M. E. Hite testified that her husband "did the dickering for the Calhoun farm;" that he bought the farm for her; that she sent him to make the contract; that the money that was paid for the Calhoun farm, she said, was paid by her husband, but he got it by disposing of her stock. The land was bought for \$25 an acre, and \$200 was paid down; that the fact that the Calhoun farm was taken in the name of both, she said, was without her knowledge and consent. She said that the money she got to pay on this farm she gathered up from stock and personal property and things of that kind; that she made a small payment; that she was very poor.

In leading up to the purchase of this Calhoun County farm, the defendant M. E. Hite testifies:

"I lived in Mahaska County four years, and before that, in Marshalltown. I had some money when we came from Marshalltown to Mahaska County. I owned a town property located in Gilman, and it was in my name. Removed from Mahaska County onto a farm in Carroll County. Rented it from Grace. When we got to Carroll County, I don't remember exactly how much stock I had, but what was there belonged to me, and he (meaning her husband) had nothing but his clothes. I had my stock left, and I rented a farm. I didn't rent it personally; I let my husband do that. The lease was taken in my name. What was made on the Grace farm was

my money, excepting what it took to pay the rent. My husband had a right to work there without pay, but I didn't hire him. While we lived on the Grace farm, the land in Calhoun was bought. The negotiations resulting in the purchase were carried on by my husband. He, and not I, made the deal. The money was paid by him, but it was got by disposing of my stock. My husband had no money when the Calhoun County farm was bought. The property I took with me to Mahaska County consisted of about six head of cattle and four horses. We stayed there four years. During this time, my husband accumulated nothing, and we lost out. Didn't take much stuff with me from Mahaska County, a few horses and some cattle. We had some lean years there. Rent was high, and we didn't have anything to start with to amount to anything and we didn't make much money."

C. G. Hite, in speaking of the purchase of this Calhoun farm, says:

"We didn't make any payments in advance. Didn't make any payment when we got it. We bought it in the fall and the first payment was made in the spring following."

It appears that they lived nine years on this Calhoun County farm; that it consisted of about 80 acres. In speaking of the relationship of her husband to her and the property, which is involved in this suit, M. E. Hite said:

"My husband was my manager to run the farm for me. He did that, of course, as a husband would. He got his board and clothes; I guess he did; I don't know but what he got all he wanted to eat and wear."

C. G. Hite, testifying concerning the purchase of the property in controversy, said:

"The purchase money for it, when it was purchased four years ago, came out of the Calhoun County farm consisting of 80 acres. We got a little bit paid on the Calhoun County deal when I slipped down here and made the deal for the land in controversy. When we talked with Osborne, we had already sold the Calhoun County farm, and had received a little more

than \$3,000 therefor. This was cash raised from the sale of the farm. We paid Osborne \$500 at the time. Think we were to pay \$1,000 later to get the deed. The \$1,000 was later paid by check, by my check, signed by me. We both signed the mortgage to Osborne for the balance of the purchase price."

He claims, however, that this was his wife's money, and bases this claim on the fact, as he says, that, notwithstanding that the Calhoun County land was held by them jointly, she was, in fact, the owner of that land and of the proceeds that went into the land in controversy.

"She frequently, after making the deed to the land in controversy, asked me to convey to her, but I suppose I was a little stubborn and wouldn't do it. I finally consented to make the deed that is drawn in question in this suit. She said it was her property. Of course, I am not as well as some people. I have heart trouble. She said, 'You know if you dropped off, the heirs will come in and rob me.' She hadn't much equity in the place and she wanted to provide for herself should something happen to me."

M. E. Hite, touching the ownership of the land in controversy, testified:

"Of course, Osborne made the deed to us jointly, but I discovered this as soon as the deed was received. I don't know why it was made to us jointly, but I knew it was in my name and his. I made objection right away, but I allowed it to remain in that way for over three years, knowing that the record showed the title to be in us jointly. I finally got it back from my husband. I got the deed back from him because his health was poor. He had heart trouble, and I had been asking him for the last two years to give it back to me. We called a doctor, and he said he was likely to drop off any minute, so I wanted the property fixed up."

It appears that this deed to her from her husband, for the land in controversy, was made a few days after the action which resulted in the judgment in question was commenced.

One F. F. Hunter, an attorney at Rockwell, testifying for the plaintiff, said :

"I furnished the money about the time the deal was closed for the Calhoun County land. I furnished \$500. Had a mortgage on the land, subject to a mortgage of \$1,600. This \$1,600 mortgage ran to the party from whom the land was purchased. These mortgages were signed by both the Hites."

As to the deed from M. E. Hite to Bowyer, it appears that a short time before the deed was executed, defendant Mrs. Hite went to Bowyer, who is her son-in-law, and asked him if he wanted to buy the land; told him that she needed \$2,000 in cash; that she would sell for \$12,200. It appears that she told him the amount of encumbrance against it; that she would only need \$2,000 in cash. She asked him if he could furnish the cash. He said that he had a friend up in the north-western part of the state who would let him have the money. It appears that this deal with Bowyer was made just a few days before the judgment in suit was entered; that three notes were made and signed by Bowyer. These notes were signed by Mrs. Hite. No security was given for these notes. It appears that these notes were made the next day after the first conversation touching the purchase of the land; that Mrs. Hite and Bowyer went before one Wicks; that Wicks gave Mrs. Hite \$2,000 for Bowyer, or Bowyer got \$2,000 from Wicks and gave it to Mrs. Hite. The notes for the balance were delivered to Mrs. Hite. It appears that then a deed was executed and delivered to Bowyer, signed by Mrs. Hite alone (This was on the 13th day of October, 1911); that the next day, a new deed was drawn up, signed by the husband, C. G. Hite, in lieu of the deed made on October 13th. It appears that Bowyer had very little property. The next day, Mrs. Hite returned to Wicks the \$2,000 that she had received as part payment on the land. Mrs. Hite claims that, when she went to Wicks, it was for the purpose of seeing if she could raise the money on the other notes, but that instead of selling her notes she bought the note that Bowyer had given to Wicks for

\$2,000. She says she supposed that he got the money from Wicks and gave his note for it. She returned the money to Wicks the next day and took the note that Bowyer had given to Wicks for the money.

"Wicks told me that he held the note, and then I proposed to buy it. Wicks said he held my son-in-law's note payable on demand. Told me the amount was \$2,000. Said it was for the \$2,000 Bowyer paid me the day before. I told Wicks I didn't want to use the money, and asked him if he would sell the note and he said he would. The note was payable on demand."

Mrs. Hite testified:

"After I bought the note, I went to Bowyer and asked him if he could pay that note on demand. He said, 'I have the money promised me.'"

It appears that the notes taken for the Bowyer land are all now in the possession of Mrs. Hite, and are past due; that the Hites are still in possession of the land, and are holding it under no lease or contract with Bowyer. It does not appear that Bowyer paid anything on the notes, interest or otherwise. It does not appear that he has taken, or attempted to take, possession of the property. It affirmatively appears that the Hites have occupied it the same as before the sale, under no arrangement with Bowyer for rent or otherwise. It appears that Bowyer took the deed to this land without the husband's joining in the deed. It appears that he took Mrs. Hite's statement as to the title to the land and the encumbrance upon it. He had no abstract and asked for none. It appears that he had no money, and very little property; was a renter on a small farm; that the banker, Wicks, and the defendant, Mrs. Hite, took his notes, if their story is true, without any security's being asked for, or given; without any arrangement as to when possession of the land would or could be taken; that the next day after receiving the money she returned the same to Wicks. At best, she says it was the next day. Mr. Wicks was not a witness in this case. So it appears that this banker parted

with \$2,000 to Bowyer without any security therefor, except that Bowyer was the grantee in a deed executed by the wife, in which her husband did not join. She claimed that she needed the \$2,000 and had to have it, and yet she says that she returned the \$2,000 the next day because she preferred a note, on demand, that would draw interest. Then she immediately proceeded to ask Bowyer whether he could pay the note on demand, and he told her that he could because Lilly had promised him the money.

There is more testimony bearing upon these questions, but we think that this is sufficient to show the trend of the transaction, and, from the whole record, we reach the conclusion that the consideration in the Calhoun County land was the product of the joint efforts of these defendants, and that the unpaid purchase price was secured by their joint obligations; that the proceeds received from the sale of the Calhoun County property was the joint property of these defendants; that the same represents the consideration paid Osborne for the land in controversy, except such deferred payments as were secured by their joint obligations. We find, therefore, that at the time the deed was made by Mrs. Hite to her husband, who owned an undivided one-half interest in the land, the sale made by him to her was without consideration, and was made by him after he had been served with notice of the commencement of the suit that resulted in this judgment, and was made for the purpose of avoiding his obligations to the plaintiff. Though there is no direct proof upon the point, we are satisfied from the whole record, and from the conduct of the other defendant, Mrs. Hite, that she knew of his purpose and intent, and received the conveyance from him for the purpose of aiding him in carrying out his intent to defraud.

As to the conveyance to Bowyer, we find from the whole record, from the haste with which it was carried on, the manner in which it was carried on, that it was made in furtherance of the same scheme and purpose, and purely colorable to that end; that no valid consideration passed, in fact, from Bowyer

to her for the deed; that the passing of the money from Bowyer to her, through Wicks, and the return of the money by her to Wicks, was only a colorable transaction, carried on between them, to the end that it might be made to appear that Bowyer had paid to her a valuable consideration for the land.

It is next contended that the defendant M. E. Hite, having permitted the title to an undivided half interest in the land to remain in the name of her husband, C. G. Hite, and credit having been extended to him upon the

2. **ESTOPPEL:**
wife's property in husband's name: credit extended to husband.

strength of his apparent ownership, it is inequitable to allow her to assert that he had no interest therein as against those who, in extending credit, relied upon his apparent

ownership.

The plaintiff testified that he would not have taken the notes, or parted with his property for which the notes were given, had not the signature of C. G. Hite been on the note, and had he not believed that the land standing on the records in Carroll County belonged to him. The notes were given by W. C. Hite for stock and machinery, and C. G. Hite signed them as surety. Plaintiff testifies:

"I understood at the time I accepted the notes that C. G. Hite had 106 acres of land in Carroll County with about \$5,000 against it."

Upon this branch of the case, we find the fact to be that the plaintiff did extend credit to the signature of C. G. Hite, in reliance upon his apparent ownership of an undivided half interest in the property in controversy, and that she is now estopped to assert a claim to the entire property as against the creditors of her husband. In *Lyman v. Cessford*, 15 Iowa 229, we find this doctrine affirmed. See, also, *White v. Morgan*, 42 Iowa 113.

In *Langford v. Thurlby*, 60 Iowa 105, 107, this court used the following language:

"We have, then, the common case of a husband and wife acquiring property by their joint industry and management,

with all the property in the husband's name, and a conveyance thereof, without consideration to the wife, to the prejudice of existing creditors of the husband. This is what the courts everywhere denominate a voluntary conveyance, and it cannot be upheld."

As bearing upon this same question, see *Citizens' Savings Bank v. Glick*, 134 Iowa 323. In *Culver v. Graham* (Wyo.), 21 Pac. 694, quoting from and approving what was said in *Besson v. Eveland*, 26 N. J. Equity 468, 472, the court said:

" 'Claims of this kind should always be regarded with a watchful suspicion, and when attempted to be asserted against creditors upon the evidence of the parties themselves, uncorroborated by other proof, they should be rejected at once, unless their statements are so full, clear and convincing as to make the justice and fairness of the claim manifest. Any other course will encourage fraud, and multiply the hazards of most business ventures.' . . . But, even on the assumption that the testimony removed all reasonable doubt of her payment of the consideration, we do not perceive how the trust could avail her in this action. Married women, with all the disabilities of coverture which are imposed by the common law, may, under diverse circumstances, be estopped from asserting their rights, either of property, of control, or of remedy, although such rights may primarily have clearly existed. To borrow the familiar phrase, her coverture was intended to be used as a shield, never as a sword. For much stronger reason may the doctrine of estoppel be applied within those jurisdictions where their property is freed from the control of their husbands, and they, by legislation, have been made persons *sui juris*."

The intent with which the conveyance was made is to be ascertained from the facts and circumstances attending the conveyance. It is not to be expected that they will voluntarily confess their guilty design in the courts. It is presumed rather that they would deny it. We look then to the facts

and circumstances attending the whole transaction to ascertain the fact.

In *Iseminger v. Criswell*, 98 Iowa 382, 386, we find this question discussed. In that case, the court said:

"Was the wife the beneficial owner of the land at the time the conveyance was made, and was the title transferred to her in execution of a trust implied by law by reason of the wife's having furnished the consideration for the property? The presumption is that the husband was the equitable as well as the legal owner of the land, for the title stood in his name, and no declaration of trust appeared in the conveyance. The burden was and is, therefore, upon the appellee to establish her claim that it was her money which purchased the . . . land, and that it was the intention of the parties that she should have the beneficial interest therein; and this she must do by clear and satisfactory evidence. . . . But aside from all this, it clearly appears that the appellant believed, when he loaned the defendant . . . the money, which loan was the basis of his judgment, that he (the husband) owned the land, and that, if he had had any notice or knowledge of appellee's equitable claim therein, he would not have loaned the same. . . . Under such a state of facts, it would be most inequitable to permit the appellee to hold the land. Her acquiescence and laches, as well as her implied consent to the ostensible ownership of the land by her husband, ought to estop her from now claiming title."

See cases therein cited.

So in this case, we hold that even if it be a fact, as claimed by Mrs. Hite, that she furnished the money that made all the payments upon this land in controversy, yet she, having permitted the title to an undivided half to remain in her husband, and the plaintiff having extended credit upon his apparent ownership, is now estopped to assert her claim as against the plaintiff's judgment.

It is next contended that, even if it be true that the con-

veyances complained of were made with fraudulent intent, yet the plaintiff is not entitled to the relief demanded, for the reason that the property sought to be subjected to plaintiff's claim, after allowing to the defendant C. G. Hite a homestead interest therein, is already encumbered for more than it is worth, and that therefore, by the conveyance, no fraud was perpetrated in fact, injuriously affecting the rights of this plaintiff; that the mere intent to defraud, where no fraud was, in fact, perpetrated, will not justify the court in setting aside the conveyance, and reliance is had to support this proposition upon *Aultman, Miller & Co. v. Heiney*, 59 Iowa 654; *Veeder v. Veeder*, 141 Iowa 492.

This court, in *Aultman, Miller & Co. v. Heiney*, *supra*, said:

"Whatever may be the intent of a conveyance, it cannot be set aside as in fraud of creditors, unless it does, in fact, hinder or delay them in collecting their debts."

This opinion is predicated upon the rule laid down by the Supreme Court of Minnesota in *Baldwin v. O'Laughlin*, 11 N. W. 77. The doctrine of this case was reaffirmed in *Veeder v. Veeder*, 141 Iowa, at 495, in which this court again said:

"If the conveyance did not, in fact, hinder or delay creditors, it was not fraudulent as to them."

In *Baxter v. Pritchard*, 113 Iowa 422, this court said:

"We think it clear that the encumbrances more than equalled the value of the land, and therefore no intent to defraud is shown."

In *Goddard & Sons v. Guittar*, 80 Iowa 129, this same doctrine is affirmed. It seems to be the doctrine of this state that no creditor is entitled to have a conveyance set aside on the ground that it was executed with fraudulent intent, when it affirmatively appears that he was not prejudiced by the act complained of as constituting the fraud.

3. FRAUDULENT
CONVEYANCES:
fraudulent con-
veyance which
does not de-
fraud: setting
aside: husband
and wife.

In the case of *Mittleburg v. Harrison* (Mo.), 3 S. W. 203, that court said, among other things, in discussing this question:

"It is contended by counsel for appellant that the judgment creditor has a right to subject the property of his debtor to sale; that it lies in no one's mouth to say that that property is worthless; that the creditor may have some special use for it, and may be willing to bid it in at execution sale, and has a right to his opportunity of doing so."

Without disposing of the case upon this issue, that court said:

"Courts take a practical view of all matters. We are not to be understood as intimating that, even had plaintiff been a creditor of Magwire at the date of the conveyance, a court of equity, under the evidence in this case, would have been bound to sustain this bill for the purpose of placing in the hands of plaintiff a barren power of bidding in this equity of redemption, to the annoyance of defendant, and without any reasonable probability of pecuniary benefit to plaintiff."

The Supreme Court of Minnesota, in *Baldwin, Admx., v. O'Laughlin*, 11 N. W. 77, said that, to make a debtor's transfer of property fraudulent as respects his creditors, there must be an attempt to defraud, express or implied, and an act, which, if allowed to stand, will actually defraud them by hindering, delaying or preventing the collection of their claims.

"The fact that the debtor mistakenly supposes or hopes that, in conveying his encumbered property, he has secretly covered up and saved something for himself, from which he designs and endeavors to exclude his creditors, does not make his conveyance fraudulent. If, notwithstanding his hopes, suppositions, and intent, it is beyond question that the encumbrances exceed the value of property, so that there is nothing left for him to cover up and save, and nothing from which to exclude his creditors, they are not injured or defrauded," and, therefore, cannot have the conveyance set aside. "Whatever may be the debtor's intent, where there is no act which

will have this effect, the creditor is not damaged or defrauded."

This doctrine was reaffirmed by that court in *Aultman & Taylor Co. v. Dalen* (Minn.), 58 N. W. 551. It is true that, in this last case, Judge Canty, of that court, dissented, and it is also true that Chief Justice Stark, of the same court, in the case of *Fryberger v. Berven* (Minn.), 92 N. W. 1125, a case in which a similar question was raised, recognizes the same doctrine, but raised a question as to whether it was legally or ethically sound.

In the case of *Sims v. Gaines*, 64 Ala. 392, that court seems to hold to a different doctrine from that announced here.

In *Bump on Fraudulent Conveyances* (4th Ed.), Sec. 215, p. 250, the doctrine is announced that if a transfer is fraudulent the grantee cannot retain the property on the ground that it is of no value, and cites in support of that statement *Garrison v. Monaghan*, 33 Pa. 232, and *Hanby v. Logan*, 1 Duvall (Ky.) 242. On examination of these cases, however, we find that they do not fully support the text, if applied to the facts in this case and the proposition here under consideration.

It may be contended that there was, in said property, an inequitable right of redemption, on the part of the Hites, of which plaintiff herein might avail himself in the event that the conveyances herein complained of were set aside, but it is not apparent to us that such a right has any substantial value, under the conditions shown to exist in this case. It would be a barren right to redeem property from an encumbrance far exceeding its value, as shown by this record. Before a court of equity will intervene, it must be shown that the plaintiff, seeking to have the conveyance set aside, has not only a substantial, but a valuable and present, right to be protected by a decree of the court. This reaches far into the field of speculation. The rights of these parties are to be judged by the conditions existing at the time that this cause was tried, and as

they appear in this record, and the court will not enter into speculation as to possible conditions that might arise, but are not shown to exist in this record.

It is true that the land in controversy was held jointly by defendant C. G. Hite and his wife. The record shows that they had occupied a certain portion of the land as a homestead. It appears, however, that this homestead was never marked off or designated. Under the law, however, they were entitled to 40 acres, and the defendant had a right, if he so elected, to have the same set off and marked as such. This homestead, of course, was exempt from execution, and could only be taken for the mortgage, after the other property mortgaged had been exhausted. The property was mortgaged, at the time that this conveyance was made, for \$5,480. These mortgages covered the entire land. There remained then 66½ acres, subject to this mortgage, outside the homestead in which Mrs. Hite had an undivided half interest. The evidence shows that the entire tract, including the homestead, was worth not to exceed \$100 an acre. It appears that this 66½ acres, separated from the homestead where the buildings are, was not worth to exceed \$55 an acre.

There is testimony that the homestead, including the buildings thereon, was worth \$175 an acre. The evidence tends to show that there were good improvements upon the portion of the land occupied by the defendants as the homestead. Deducting the value of the homestead from the value of the land as a whole, it would appear that there was insufficient to pay even the mortgage debt. Figuring the land separate and distinct from the homestead, as estimated by the witnesses, it would still appear that there was insufficient to pay the mortgage debt. It would, therefore, appear from this record that the plaintiff was not prejudiced, and no fraud was perpetrated upon him by the conveyance. Therefore, under the rule laid down in the cases above cited, we think that the judgment of the court ought to be affirmed, and is—*Affirmed*.

EVANS, C. J., LADD, WEAVER, PRESTON and WITHBOW, JJ.,
concur.

DEEMER, J. (dissenting).—Although concurring in the finding of fraud, I cannot agree to the conclusion of the majority that plaintiff is not entitled to relief. As a judgment creditor, plaintiff had the right to ignore the fraudulent conveyances, to levy upon and sell the land non-homestead in character, secure a deed thereto, and then bring action for possession, to set aside the fraudulent conveyances, and to quiet his title as against all the defendants, or to proceed in equity by creditors' bill to remove the cloud, set aside the fraudulent conveyances, and to sell the land under either general or special execution. He chose the latter course, and, notwithstanding a finding that the conveyances were actually fraudulent, and made with intent to hinder, delay and defraud creditors, plaintiff is defeated because certain witnesses have testified that, taking out the homestead, nothing of value remained; and plaintiff should not be allowed to harass the fraudulent actors in these transactions.

Personally, I do not think that these parties, who are confessedly guilty of actual and deliberate fraud, are entitled to much consideration at the hands of any court; nor do I believe that either law or equity will lend them any assistance. These conveyances, being fraudulent in character, were as if never made. If defendants Hite still owned the land, and there had never been any conveyances to defraud creditors, no one would hold, I think, that plaintiff, a judgment creditor, could not have levied upon and sold the land, or defendant C. G. Hite's interest therein, and neither he nor the other encumbrancers could have been heard to say that the property had no value. That was a matter in which plaintiff had the right to take his chances. If he were willing to chance it, neither the judgment debtor nor any of his creditors could suffer, and, if there was anything of value in the property, plaintiff had the right to subject it to the payment of his

judgment, and in so doing had the unquestioned right to speculate on the future. This being true, does it lie in the mouth of the defendants, who entered into an arrangement to defraud plaintiff, to say that plaintiff was not in fact defrauded, because there was nothing of value in the land? I think not. To permit plaintiff to set aside these fraudulent conveyances and to sell the land subject to the encumbrances would harm no one. As it is, the fraudulent grantees may at least hold possession of the land, and enjoy the rents and profits so long as the encumbrancers see fit to permit them to do so, and this right would continue for at least one year from the time they sold the land; for the defendants, or some of them, would have that long a time in which to retain possession and to redeem. Moreover, we have expressly held that the equity of redemption in land, or the right to possession until the equity of redemption is cut off by proper proceedings, is subject to levy and sale. *Barnes v. Cavanagh*, 53 Iowa 27; *Sheehy v. Scott*, 128 Iowa 551; *Thomassen v. De Goeij*, 133 Iowa 278; *Crosby v. Elkader Lodge No. 72*, 16 Iowa 399; *Curtis v. Millard & Co.*, 14 Iowa 128; *Kendig v. McCall*, 133 Iowa 180.

None of the encumbrancers of the land have taken any action to foreclose or cut off the equity of redemption, and the fraudulent grantors, or their grantees, are in the undisputed possession of the land, and enjoying its rents and profits. This they have a right to do, until their equities are fully cut off by proper proceedings against them. These may be indefinitely deferred, and yet it is said there is nothing in the land which plaintiff may sell. I cannot see the logic of this position in view of our previous holdings regarding the right to sell an equity of redemption. That it is worth something, and that plaintiff has the right to subject it to his judgment, I have no doubt.

The textbooks, and what I regard as the weight of authority, are with me on these propositions. See Wait on Fraudulent Conveyances (2d Ed.), Sec. 31; Bump, Fraudulent Con-

veyances (4th Ed.), Sec. 215; *Sims v. Gaines*, 64 Ala. 395; *Fassit v. Phillips*, 4 Whart. (Pa.) 399; *Mittleburg v. Harrison* (Mo.), 3 S. W. 203.

The fact that a fraudulent conveyance has been made of this equity of redemption in no manner changes the rule. I do not relish the idea that parties guilty of actual fraud, or of an intent to defraud, may still hold possession of land, take its rents and profits, and say to a judgment creditor whom they intended to defraud:

"True we did all these things, still have possession of the land and the enjoyment thereof, yet, as the land is already encumbered for all it is worth, you whom we intended to defraud have no right to disturb or harass us."

In my judgment it was for plaintiff to say whether he cared to go ahead and take his chances on getting something out of the land. He unquestionably had the right to speculate upon a rise in value or upon any other adventitious fact or circumstance.

I would reverse the judgment.

FARMERS' SAVINGS BANK, Appellee, v. W. R. JAMESON,
Appellant.

GUARANTY: Construction—Unlimited Guaranty—Rule of Reason.

- 1 A *general* guaranty of the solvency of a proposed borrower, *unlimited* both as to time and amount, may not be construed and acted upon by the guarantee to an extent which the guarantor did not and could not, in reason, intend or anticipate.

FRAUD: Fraudulent Representations—Justifiable Construction of

- 2 **Language.** One may not rely and act on the language of a false representation, however vicious, beyond that meaning which has been placed on such language by (a) the approved usage of the language, (b) the meaning in law that a technical phrase may have attained, or (c) the law of the land.

BANKS AND BANKING: Loans—False Representation as to Sol-
3 **veny—Implied Limitation on Language.** A false representation

to a bank that a proposed borrower "was good for *any* arrangement" which the bank might make with him, impliedly means "any arrangement *not repugnant to sound and safe banking.*"

BANKS AND BANKING: Loans—Guaranty or False Representations as to Solvency of Borrower—Effect of Statute. A guaranty to a bank of the solvency of a proposed borrower, or even an intentionally false representation as to the solvency of such borrower, to the effect that such borrower is "good for *any* arrangement" which the bank may make with him, is necessarily limited by the statute law of the state (Sec. 1870, Code Supp., 1913) as to what "arrangements" are permissible on the part of the bank with such borrower. Such guaranty or representation cannot be construed as authorizing or justifying the bank in violating law.

CRIMINAL LAW: Misdemeanor—Prohibited Act Without Penalty.

- 5 Whether the making of loans by state banks to single borrowers in excess of 20 per cent. of the bank's actually paid-up capital, in violation of Section 1870, Code Supp., 1913, is a misdemeanor, under Section 4905, Code, 1897, *quære*.

FRAUD: Fraudulent Representations—Justifiable Reliance—State

- 6 **Bank Loans.** One who fraudulently represents to a state bank that a proposed borrower is "good for *any* arrangement" which the bank may make with him is liable only for such loan as the bank may *legally* make to such borrower, to wit, a loan not exceeding 20 per cent. of its "actually paid-up capital." (Sec. 1870, Code Supp., 1913). And this is true even though such borrower could not, by reason of a violation of such law, defeat the collection from him of the loan, and even though the violation of law be conceded not to be a crime on the part of the bank.

DEEMER and PRESTON, JJ., dissent.

CONTRACTS: Construction—Avoiding Literal Terms of Writing.

- 7 The literal words of a writing are not to be so strained as to justify the doing of improper and unsafe things which are condemned and forbidden by law, or the commission of a breach of trust.

PRINCIPLE APPLIED: Plaintiff was a state bank with a paid-up capital of \$10,000. Section 1870, Code Supp., 1913, commanded that the total liability to the bank of any borrower of money should not, at any one time, exceed 20 per cent. of the paid-up capital; in other words, in this instance, \$2,000. Plaintiff received from defendant a letter, in which defendant stated that a proposed borrower was "*good for any arrangement*" which the bank might make with him. Plaintiff relied thereon, and loaned to said borrower until the liability of said borrower exceeded

\$60,000, and he was wholly unable to pay. Plaintiff claimed that the said representation as to the borrower was intentionally false. *Held*, the defendant could under no circumstances be held liable in a sum in excess of \$2,000, irrespective of the literal language of the representation.

**FRAUD: Fraudulent Representations—Damages—Payments—Ap-
8 plication—Suretyship.** Where a fraudulent representation to a bank as to the solvency of a proposed borrower was relied on by the bank by making loans far in excess of that which was justified by the representation, and the borrower *repaid* the bank an amount in excess of what the bank was justified in loaning on the representation, such repayment worked an entire discharge of the liability of the one making the representation.

DEEMER and PRESTON, JJ., dissent.

FRAUD: Fraudulent Representations—Evidence—Insufficiency. Record reviewed, and held insufficient to establish the making of any *fraudulent* representation to a bank as to the solvency of a proposed borrower.

DEEMER and PRESTON, JJ., dissent.

Appeal from Blackhawk District Court.—CHAS. W. MULLAN, Judge.

MONDAY, APRIL 10, 1916.

ACTION at law to recover damages for fraud and deceit accomplished by means of a letter written by defendant to plaintiff, which is alleged to have induced plaintiff to loan a large sum of money to the Central Iowa Granite Company. Verdict and judgment for plaintiff in the sum of \$40,000. Defendant appeals.—*Reversed*.

Edwards, Longley, Ransier & Smith, and J. W. Arbuckle, for appellant.

Williamson & Willoughby, and *Mears & Lovejoy*, for appellee.

SALINGER, J.—I. Defendant wrote plaintiff a letter, in

effect, that its bearer was a desirable bank customer, would probably need to use considerable money, was thoroughly reliable, and was "good for any arrangement" it

1. GUARANTY:
construction:
unlimited guar-
anty: rule of
reason.
- might make with plaintiff. Plaintiff was a bank, which was forbidden by Section 1870

of the Code Supplement, 1913, to loan more than \$2,000 to any one borrower; but, from time to time after receiving this letter, it loaned the party so presented more than \$60,000, and the borrower is wholly unable to pay. The bank contends that it would not have loaned at all had it not been for said letter, and was induced thereby to loan said large sum. It had a verdict against defendant for its said loss. The trial judge charged that the statement as to being good, etc., is "the material part of this letter," and, if the damage suffered by plaintiff by the said loaning was "the immediate consequence" of relying thereon, defendant will not be relieved from liability, though the loan "was in violation of law and in sums beyond the authority of the bank to make." Appellant urges that this charge is erroneous, in that it permits a recovery for the total of the loans; because, in no view, was defendant liable for more than the \$2,000 which might lawfully have been loaned; that any loan above \$2,000 could not be *any* "consequence" of the letter and, therefore, no "immediate consequence" of the same. This attack presents whether the law has put any limitations on what should be understood from the phrase "good for any arrangement" a proposing borrower might make. If, for illustration, said letter is to be treated as a general guaranty, unlimited both as to time and amount, then, though its maker undertook "to become responsible for any amount of credit you may give him," he would still not be bound for "an unreasonable amount of credit." *Lehigh Coal & Iron Co. v. Scallen* (Minn.), 63 N. W. 245. If we may treat this letter as being no more than such guaranty, we would readily hold that the loaning of more than \$60,000 to a stranger, a country

dealer in gravestones, made by a bank having a capital of \$10,000, and limited by statute to \$2,000 per borrower, was so unreasonable a credit as that the guarantor could not be charged with it, because he neither intended nor anticipated it. It is manifest, then, that, if we may not thus hold, it is because the finding of the jury settles that the letter was a fraudulent false pretense, and that, therefore, the writing of it was not a guaranty, but a tort.

One difference between a letter of guaranty and a letter which is a tort is that one who so commits a tort may not defend that his writing had unexpected consequences. *Doyle v. Chicago, St. P. & K. C. R. Co.*, 77 Iowa, at

2. FRAUD: fraudulent representations: justifiable construction of language. 610; *Texas & P. R. Co. v. Carlin*, 111 Fed., at 778; *Fotler v. Moseley* (Mass.), 70 N. E. 1040; *Hill v. Winsor*, 118 Mass. 251; *Jones v. Boyce*, 1 Star. N. P. 493. And the essence of appel-

lee's theory is that, because of this rule of damages in tort, defendant may not urge that he could not anticipate that \$60,000 would be loaned on the strength of the fraudulent pretense with which he is charged. It is perfectly true that he may not do this if the pretense was broad enough. But does the fact that it will not avail one who *does* make a false pretense to say that he could not reasonably anticipate the consequences that *did* follow, make him liable for a pretense which he did not make? That one who utters a false pretense may not escape the consequences of it, no matter what they are, certainly has no bearing on the question of what his false pretense was, nor bar the defense that the loss sustained is not a consequence of his writing at all. The existence of said rule of damages merely enlarges what may be recovered for a wrong which *has* been committed. The least reflection should demonstrate that the rule does no more than settle that, in cases where a charged representation is established, the defense that its consequences were unforeseen, or could not have been foreseen, is eliminated. But, surely, such rule does

not interfere with showing that no false pretense was made, or that what was suffered by complainant was not caused by such false pretense as was made. That a stated act's being done precludes inquiry into whether its consequences could be anticipated neither proves that such act was committed, that it had any consequences, nor what were its consequences. Once show that this defendant did fraudulently write a falsehood which may in reason have been understood to represent that the Granite Company was financially responsible for any amount whatsoever, and he may not say that he should not have been believed, nor that he could not foresee that so large a loan as was, would be, made. But, if he made a representation which could not thus be understood, then, no matter how fraudulent was his letter, its representations would still be no more than they were. A fraudulent representation that one is good for \$2,000 would not make him liable for all loaned if \$60,000 be loaned. While the representor may not say that, though he falsely represented that a borrower was good for \$2,000, he did not anticipate that such sum would be loaned, he may defend against being held liable for a \$60,000 loan, not because the larger loan could not have been anticipated, but because he never represented the borrower to be good for the larger loan. The falsity of the pretense that the borrower is good for the smaller sum, coupled with the fact that the larger sum was loaned, cannot enlarge the pretense that was in fact made. The excess of the loan above \$2,000 is not an *unexpected consequence* of the pretense which was made, but it is not its consequence at all. If we must hold that the representation made was limited to a loan of \$2,000, then, as to the loan in excess thereof, there is no question of fact as to whether the larger loan was proximately due to such representation. Our question is not whether defendant made a false representation not limited to a loan of \$2,000, and whether he may evade it by claiming that he could not foresee that \$60,000 would be loaned. It is whether a loss suf-

ferred by plaintiff was caused by justified reliance upon the representation which *was* made. No matter how vicious the fraud perpetrated, plaintiff may not recover more than such fraud induced him to lose; and Instruction 12 so rules. It follows, the vital inquiry is, what is the representation that was made,—more concretely, how should plaintiff have, as a matter of law, understood what was written to him? However the damages permissible may differ in tort and on guaranty, what language used means, is settled by the same rules in either case. While one may not commit a tort by writing and have read into it a limitation as to what damages resulting he is to be responsible for, he may insist that what he has written is not the tort which plaintiff claims it to be. There is no rule of construction peculiar to determining the meaning of written words which constitute a tort. The same words are dealt with in the same way, whether found in a statute, an alleged libel, or a contract. We have applied the ordinary rules of construction in tort, or, rather, in determining how a statute forbidding a tort should be construed. *State v. Gardner*, 174 Iowa 748, involves how the words "any person" should be construed when found in a statute which makes it a felony to resort to a house of ill fame, for stated purposes. It goes without saying that the felony of so resorting to such house is as much a tort as the writing of a fraudulent false pretense. We held, in *Gardner's* case, that the phrase "any person," found in such statutes, though broad enough to include all human beings, is limited by the rule of reason; and that, in determining how the use of words was understood, there should be taken into consideration what was the general understanding of the law as it existed before such statute was made, in order to arrive at what meaning such words in such statute would convey; and that it should not be held that the legislature contemplated absurd literal interpretation of said general words. If the approved usage of the language, or the meaning in law of a technical phrase or pre-

existing law, may be read into a statute which creates a felony, and if the words therein found may be interpreted and limited by considering these, it must follow that, whenever it becomes a question whether a written false pretense induced a loss, the rule of damages in tort affords no reason for blocking an inquiry on what the words used in the pretense mean, in law. Dealing with "any person," when defining to whom a criminal statute applies, and "any consequence," used in a false pretense, calls not for different rules of construction. Though the consequence of what was written must be met, whether anticipated or no, no rule of law prevents reading into a written false pretense either the approved usage of the language, the meaning in law that a technical phrase may have attained, or the law of the land. The point, then, narrows to how, applying the ordinary rules of construction, plaintiff must have understood defendant's letter.

2.

If, to the statement that the proposed customer "was good for any arrangement he might make," there had been added, "but not exceeding the borrowing of \$2,000," it will be agreed

3. BANKS AND
BANKING:
loans: false
representation
as to solvency:
implied limita-
tion on lan-
guage.

that, though the rating as worthy a credit of \$2,000 were a deliberate fraud, defendant would not be liable for \$60,000 loaned in addition to \$2,000. If, for any reason, plaintiff must have understood the unlimited statement to be limited to a credit of \$2,000, then the case stands as though the supposed limitation had been written into the letter. If, for any reason, plaintiff must have understood that, when defendant wrote that the company was good for "any" arrangement it might make, he meant to convey that "any" such arrangement meant one that was not repugnant to sound and safe banking, then the letter to plaintiff is to be treated as though it stated such proviso. If, by

general banking usage, known to both the banker who wrote and the banker who received the letter, the phrase, "good for any arrangement to borrow" meant an arrangement sanctioned by good banking, then, no matter how fraudulent, the representation made to plaintiff was still not one that the company was good for "any" loan it might be willing to take, but good for one not in excess of the limit set by sound and safe banking. If the broad words used had become thus limited by "context and the approved usage of the language," or because they constitute a technical phrase which was thus limited by having acquired "a peculiar meaning in law," then the broadly worded representation carried on its face a restriction to whatever was sound and safe banking. We have already pointed out that the word "any" does often have a meaning narrower than the literal; that it is never to be taken literally at the expense of reason. Should it here be given its broadest meaning? The parties sustained no fiduciary relations,—indeed, no relations. Yet the letter was signed by a bank president, and we must assume for plaintiff that it believed his letter to be an honest one. Still, it was, after all, the letter of a stranger. The record discloses no knowledge of or about him beyond that the recipient recognized him as the one who presided at a bankers' meeting at Vinton. Every mental step which overcame that fact, by giving weight to the standing of one who was such bank officer, involved thinking that such an one writing to a brother banker in honesty would not request what it would be unreasonable, in fact, for a stranger to do, and unreasonable for him to think or believe a stranger would do—involved the thought that he would not ask the making of loans that one of his standing would not make. Whatever led plaintiff to act out of deference to the writer threw light on the meaning of his letter. Its recipient could not conclude that it was safe to loan because an eminent, honorable, financial authority represented it to be proper, and believe, too, that such authority was requesting it to loan

all its funds, and more than six times its capital, to a non-resident country monument dealer, of whose affairs it knew nothing, without bankable and adequate security. Applying the elementary canons of construction to such situation and conditions, constrains us to hold that the representations made, honest or no, could not, in reason, have been understood to be that the company was, literally, good for any sum whatsoever, and must have been understood to speak to nothing above any loan which a bank of the class to which plaintiff belonged, would, in reason, be likely to make to such a borrower, or any borrower, in the circumstances—a loan that was proper banking.

3.

Now, ordinarily, what was such a loan would be a jury question. But is that so if the law defines what is such banking—if it be settled, as matter of law, that loaning more than \$2,000 is unsafe, discredited, and, therefore, prohibited banking; if, in a word, statute law may be read into the letter? All who do business in the state are conclusively held to know its law. It is not strained to assume that both parties, bankers, actually knew the statute law on banking. In our view, such law does declare that a loan, here, of more than \$2,000 was unsafe and discredited banking, and forbids it.

Section 1870 of the Code Supplement, 1913, prohibits this plaintiff bank to permit one borrower to become liable to it beyond \$2,000. Section 1877, Code, 1897, makes it the duty of, or at least empowers, certain officers to wind up the affairs of a bank which violates Section 1870, with a receivership. It is a question whether a violation of 1870 is not within Section 4905, Code, 1897, which provides that, when

4. BANKS AND
BANKING:
loans; guaran-
ty or false rep-
resentations as
to solvency of
borrower: ef-
fect of statute.

5. CRIMINAL LAW:
misdemeanor:
prohibited act
without pen-
alty.

the performance of any act is prohibited by any statute, and no penalty is imposed, the doing of such act is a misdemeanor.

Whether it is, needs, for reasons presently to be stated, not to be decided; and we may assume, for the purposes of this decision, that no punishment is provided for those who disobey Section 1870. It is true, too, but we think

6. FRAUD: fraudulent representations; justifiable reliance: state bank loans.

not material, that the one who borrows more than such statutes permit may not resist judgment by pleading the violation of such statute.

5 Cyc., page 580, Note 95; *Portland Bank v.*

Scott (Ore.), 26 Pac. 276; *Wyman v. Citizens' Nat. Bank*, 29 Fed. 734; *O'Hare v. National Bank*, 77 Penn. St., at 102; *Gold-Mining Co. v. National Bank*, 96 U. S., at 641; *Mills County Nat. Bank v. Perry*, 72 Iowa, at 16; *Weber v. Spokane Nat. Bank*, 64 Fed., at 211; *Savings Bank v. Boddicker*, 105 Iowa, at 558. These but declare that the statute rule is for the safety of the bank and its stockholders and creditors; that to prevent recovery of the borrower would, therefore, injure those whose protection is the object of the statute; and that one who keeps what he got by having the statute violated should not be heard to object to payment because what he received was got in spite of the statute prohibition. And the *Boddicker* case, *supra*, so holds as to the surety of the borrower. As put in *Gold-Mining Co. v. National Bank*, *supra*, "after obtaining and holding to its own use the money," the company cannot be allowed to interpose the plea that the bank had no right to loan the money. And see *Portland Bank* case, *supra*. It is true, as well, though again immaterial, that recovery is allowed because it is for the government and not the borrower to punish for the disobedience of such statutes. *O'Hare v. Bank*, 77 Penn. St., at 102; 5 Cyc., page 580, Note 95; *Wyman v. Bank*, 29 Fed. 734.

How does all this matter? True, the borrower here could not defeat judgment; true, it is not permitted to punish the lender. But the controversy is not over whether one who got

and retains the proceeds of a prohibited loan is estopped to urge the violation of the law committed in loaning to him, nor over whether the lender may be punished, and, if so, how and by whom, but over whether a recommendation should have been understood to be limited to loans that did not constitute bad and prohibited banking, as defined by statute.

It is possibly to be gathered that there is suggested that, since the borrower may not avoid the contract, a stranger may not. It misses the point. This defendant is a stranger to the borrowing and lending. He is not liable as a

7. CONTRACTS:
construction:
avoiding literal
terms of writing.

borrower at all, not even up to \$2,000. He has no need to and could not urge that part or all of the loan is uncollectible because of said statute prohibition or rule. But all this does not establish that he may not say that his letter did not advise a disregard of said statute, limited the plaintiff to loans not within its condemnation, and suggested the limitations of this statute. That the borrower is estopped, and that the lender may not be punished, in no way meets the statement of *Fowler v. Scully*, 72 Pa. 456, noted in *O'Hare's* case, *supra*, that the statute is a regulation "to prevent these associations from splitting on the rock which has ruined so many banks, to wit, that of lending too much of their capital to one person or firm, the intention being to protect the association and its stockholders and creditors from unwise banking, we cannot suppose it was meant to injure them by forbidding recovery of the injudicious loans." It in no way establishes that plaintiff was justified in understanding the letter to advise the making of a prohibited loan which, as a matter of law, was unwise banking. It is not to be assumed that the recipient of the letter said to himself that, though to loan these parties six times the capital and substantially all the money of the depositors is unsound banking and is prohibited by law, this letter advises doing this, and should be followed, because so loaning, while it may close the bank and ruin its owners

and creditors, will not send the lender to jail, and because the stranger borrower will not be able to prevent the getting judgment against him. General language should not be construed to authorize any and all acts upon which the criminal law has not laid its ban, and for consequences of which the courts will afford some remedy.

We have gone so far as to hold that a statute which is void may still fix public policy. Mr. Justice Deemer, speaking for the court, said, in *Dorn v. Cooper*, 139 Iowa, at 750:

"The legislature, in declaring the public policy of the state, had spoken in an authoritative way, and, although the statutes may have been void, because not uniform in their operation, or because of the varying degrees of punishment, the acts with which plaintiffs were charged were none the less contrary to public policy of the state, as declared by proper legislative authority."

If one receive a letter requesting that the recipient do "anything" in his power for a third person, it should not be construed to include lying for him, or inducing the widowed sister of recipient to embark every dollar she has in some utterly reckless speculation proposed by the other. And this is so though lying is ordinarily not punishable by fine or imprisonment, though such advice be not punishable, and though the widow is saved the right to get a worthless judgment as a substitute for all her means of livelihood. It reverts to the undeniable proposition that words are not to be strained into a request to do improper, unsafe things condemned by law, or to commit a breach of trust against depositors, merely because what is done is not a criminal offense, and because, for reasons of public policy, the courts will entertain attempts to remedy such misdoing.

The result is that, even in tort, defendant can be put in no different position than he would occupy had his representation been in terms limited to a credit not exceeding \$2,000. It follows that he is not liable for the loss of plaintiff by loan-

ing more than that. It remains but to determine whether he is, in any view, bound to repay up to \$2,000.

II. Without determining what it was, in fact, that induced the plaintiff to part with any money, the utmost that may be claimed for plaintiff on this record is that a false representation concerning the solvency of a borrower

induced it to loan \$2,000, to its loss in that amount. It appears that the borrower repaid more than that sum. If, after parting with \$2,000 because of a wrong done by defendant,

plaintiff had compelled the borrower to repay that sum, it would be clear that, no matter what the wrong of defendant, he would be absolved from liability, for the simple reason that his wrong had ceased to be injurious. Now how is this changed because a borrower who had fraudulently obtained \$2,000 by the help of defendant, and, say, \$18,000 more through an act of plaintiff, not induced by defendant, pays back, say, \$10,000? In a sense, defendant is a surety for \$2,000. It is in the sense that, of a larger aggregate of loans lost, he is holden to save the lender harmless for but \$2,000, and may urge that the applying of \$10,000 received on what he is not liable for at all is to give undue preference to the plaintiff whose act caused the loss *above* \$2,000 as much as defendant's caused the loss *up to* \$2,000. We think that, in these circumstances, defendant may insist that, when the fraudulent borrower restores more than \$2,000 in reduction of a loss greater than \$2,000, the sum received should be applied as far as necessary to extinguish defendant's liability for the loss of the smaller sum, and should not be devoted by plaintiff to the payment of the loss above \$2,000, which, so far as defendant is concerned, would never have happened but for the act of plaintiff. Some such thought as this rules *Savings Bank v. Seidensticker*, 128 Iowa 54, 55, as to the surety of an embezzler; and *Crane Co. v. Heat & Power Co.* (Wash.), 78 Pac. 460, lends considerable support to this position.

2.

If there be doubt as to this, there is another reason why defendant should not be held responsible in any sum. We have examined this record with the care due the gravity of the issues, and are satisfied by such investigation that there is no sufficient, if indeed any, evidence that any representation made

9. FRAUD: fraudulent representations: evidence: insufficiency.

by defendant was fraudulently made. And

our passing upon this point is, notwithstanding the disposition of the case, no mere dictum. The lack of proof is duly presented. A finding of no fraud is at least an alternative finding. It furnishes a reason why the decision is right, even if the arguments that no representation was made and that liability has been extinguished be not tenable. If, in passing on the alleged fraud, we may be said in any sense to depart from the rule of "needless decision," we think there is a peculiar situation which justifies, if, indeed, it does not demand, a seeming departure from that rule. There is in the record a verdict and a judgment which find the defendant guilty of an intent to defraud. A reversal on the ground that no representations were made concerning the right to credit above \$2,000, and of repayment by the borrower, does not exclude that defendant fraudulently represented the Granite Company to be good for as much as \$2,000. Finding that the evidence does not disclose any fraud, we think we should so declare, because our ultimate conclusion obviates a retrial, and thereby all opportunity for defendant to set aside the now existing finding of fraud below, on a retrial.

III. Various other contentions are fully argued. Among them are: (1) Whether, under the pleadings, it was error to permit a recovery if it be found defendant had asserted positively, and of his own knowledge, that something was true, though he did not know whether it was true or false; (2) whether the letter should not have been understood to refer to the buying of commercial paper rather than to the loaning

of money; (3) whether the statement as to financial standing was more than a naked opinion; (4) whether a recovery may rest upon failure to advise plaintiff if defendant learned, after writing, that the company was or had become insolvent; (5) whether plaintiff in fact relied upon the letter, and, if so, whether the case be not within the ancient rule which denied recovery as for fraud to one who was not "an innocent;" (6) whether insolvency may be shown by opinion testimony; (7) whether insolvency may be established by showing that one is generally reputed to be insolvent, and, if so, whether such general repute in his community is any evidence that one who lived there and asserts him to be solvent is responsible as for asserting that which he knew to be false.

Having concluded that defendant never made a representation that the Granite Company was good for more than \$2,000, and that any loss sustained up to that sum has been repaid, and, if this be not so, yet no fraud induced any loss sustained, it becomes apparent we should not pass upon the various other error points made.

The case must be, and is—*Reversed*.

EVANS, C. J., LADD, WEAVER and GAYNOR, JJ., concur.

DEEMER, J. (specially concurring)—While agreeing to a reversal of the case, I dissent from the ground thereof, and from the legal conclusion announced in the opinion. I especially dissent from the finding that there was not sufficient evidence of fraud and false representations to take the case to a jury. I disagree with the conclusion that, even if there be fraud and actionable misrepresentations, no recovery can be had, because of payments which should be credited to the account, and especially disagree with the rule of damages announced in this tort action for deceit.

The first is a question of fact, and the other two propositions, questions of law.

I. Upon the first proposition, I think the question was one for a jury, and that we are usurping its functions in saying that there is not sufficient testimony of fraud. The case, as I understand it, is this: Plaintiff is a state savings bank, doing business at the town of Morrison, in Grundy County, Iowa; and the defendant was the president of the Citizens' Savings Bank of Waterloo, Iowa. E. A. Boggs and L. D. McCloud organized what was known as the Central Iowa Granite Co., which was simply a trade or partnership name, for the handling of granite and other monuments, with its principal place of business at Waterloo; although it did business in ten or twelve counties adjacent to Black Hawk, and considerable in Grundy County. McCloud was the active manager in the business until about April 1, 1910, when Boggs also became active in it, and he (McCloud) continued his connection with it until January, 1911, when he retired. After April 1, 1910, and until the failure of the company, in January, 1912, Boggs was an active, and for the last year the sole, manager of the company. In the year 1910, the company did a \$20,000 business, and in the year 1911, its business amounted to approximately \$40,000. It failed in January, 1912, and at that time, owed approximately \$120,000 more than its total assets. On April 1, 1910, the liabilities of the company were from \$50,000 to \$60,000, and, by July of the same year, they had increased to close to \$75,000.

Boggs now claims that he did not discover the condition of affairs until some time after he had taken exclusive charge of the business. McCloud was the practical man of the firm and did practically all the business, until Boggs severed his connection with other enterprises and devoted his exclusive time to the business, about April 1, 1910. The firm was doing business with a number of banks in the territory of its operations, among them being the Citizens' Savings Bank and three others in the city of Waterloo. Desirous of obtaining credit with plaintiff bank, Boggs procured from defendant the following letter:

"CITIZENS SAVINGS BANK

"Waterloo, Iowa, June 29, 1910.

"W. R. Jameson, Pres. F. C. Braniger, Cashier.

"F. F. McElhinney, Vice-Pres. A. E. Smith, Asst. Cashier.

"Mr. E. H. Reimer, Cashier,
"Farmers Savings Bank,
"Morrison, Iowa.

"Dear Sir:

"The Central Iowa Granite Company is doing a large business in your territory and have very good paper to handle from time to time. They are good customers of this bank and I have suggested to Mr. Boggs that whatever business they have there be done at your bank. They are thoroughly reliable and good for any arrangements they may make with you. Just now they are buying up a large supply of monuments for their fall business and, of course, use considerable money. Their business is very large and this stock is rapidly turned into money again.

"Any favors you may show Mr. Boggs will be appreciated by me and I shall be glad to turn you any favors I can.

"Yours truly,

"W. R. Jameson, President."

Boggs took this with him to the cashier, to whom it was addressed, and made application for a loan, and also arranged to negotiate the company's contracts for monuments with plaintiff's bank, and to handle a part of its business. Plaintiff contends, and offered testimony to show, that all its subsequent dealings with the Granite Company and with Boggs were had on the strength of this letter, unless it be a loan of \$500 negotiated on June 28, 1910, on the strength of another letter, which is not in the record. Collateral contracts were deposited as security for this loan. On the strength of the letter above set out, plaintiff loaned to Boggs and his firm \$1,000 on June 29th, and soon thereafter, more loans were made, and from

that time on, during the balance of the year, loans were very frequent, and money was advanced to the firm and to Boggs at intervals during the next year; so that, on March 1, 1911, the indebtedness to the bank amounted to \$52,000, and in September of the same year, it had increased to \$62,000.

Plaintiff's cashier testified:

"At the time I received the letter Exhibit 'A', I had no personal knowledge of the affairs of the Central Iowa Granite Co. or E. A. Boggs or L. D. McCloud. I recognized the signer of the letter as being the gentleman who presided at the bankers' meeting at Vinton. I read the letter, believed the statements in it to be true, and relied upon the truth of the statements in loaning Mr. Boggs and the Central Iowa Granite Co. this money. I was induced as cashier of the bank to let Mr. Boggs have the money on account of being highly recommended by Mr. Jameson. I took it for granted that the company, no doubt, was as represented and would meet their obligations as has been stated. Mr. McCloud, the other partner, never came to our bank for the purpose of borrowing money. It was all given to Mr. Boggs. The monument contracts left there were endorsed by the Central Iowa Granite Co., by E. A. Boggs, President. The aggregate of all these contracts that were in the bank in September, 1911, was about \$12,000. There were times during this period when he got money there without leaving contracts. I surely would not have loaned this money of the bank to Boggs or to the Central Iowa Granite Co. had it not been for the statements in this letter. There was a meeting of the directors of the bank in March, 1911, and on that occasion the amount of the indebtedness was ascertained. The directors gave me instructions not to let Boggs have any more money. Q. Do you know about or approximately what quantities of money if any you let Boggs have after that time? A. It was something like ten thousand dollars. Q. How did you come to do that? (Objected to as immaterial. Overruled. Defendant excepts.) A. Well, Boggs stated to me that he had vast quantities of

granite on the track in Waterloo and in transit, and if I could furnish the money so that he could release that immediately, why he would be able to get back larger quantities of money than he would get at that time. In fact, a good many of those shipments which he claimed he was getting, contained some of the monuments for which we held contracts. He got money after this time in March on several occasions."

The capital of the plaintiff bank was \$10,000, and the loans made to Boggs and his concern were grossly in excess of the amount authorized by law. Section 1870 of the Code Supp., 1913, provides that such loans shall at no time exceed 20 per cent of the actually paid-up capital stock of the bank. But the same statute provides that the discount of commercial business paper actually owned by the person or firm negotiating the same shall not be considered money so borrowed. The nature of the transactions with the bank was thus explained by one of the witnesses:

"The first time I ever saw Boggs was on June 28, 1910, and on that occasion I loaned him \$500. He had some contracts with him at that time, maybe with people who lived somewhere through the country, for the erection of monuments by Mr. Boggs' company and provided for payment of a certain sum for the monuments when erected. Mr. Boggs left some of these contracts with me on the first day as security when he borrowed the \$500. That is what I relied on when I let him have the \$500. When he came back the next day, he assigned as collateral security for the \$1,000 he borrowed at that time, a contract of just about that amount. He came at different times after that with contracts of a similar nature. He had notes at various times which he had taken for monuments which his customers had given when he set the monuments and made settlement,—and came and discounted those notes at the bank. On the 28th or 29th of June when he was there, he explained to me his method of obtaining these contracts and how he was doing business, that these contracts were obtained and the money on the contracts was not to be

paid until the monuments were set up. These contracts were assigned over to the bank as collateral security for the money he was getting. Sometimes there was money obtained at the bank when there was no collateral security left at all, and I had an understanding with Boggs that all the collaterals he left there should be held for any money that he might borrow or any indebtedness to the bank, so that I relied upon this security for any debts, whether he happened to bring the contracts at the time I gave him the money or not, and relied upon all the contracts as collateral. Some of the contracts and notes discounted which he brought there were against people in that vicinity, and where they were not in that vicinity, I made no inquiry as to their responsibility. Quite a number of these notes which he discounted in the bank were notes that he gave himself that were paid from time to time. He gave notes of his own or of his granite company, and when they became due might pay them or renew them—went through the usual form of bank's business with a customer, discounting his paper, borrowed money and paid money from time to time, extending for a year or a year and a half. Some of these contracts that he left with me as collateral security for his liabilities to the bank were taken up and paid from time to time. On some of them, Mr. Boggs collected the money and sent it to me. I do not know the aggregate of the payments of money for contracts turned in at different times, but whatever they amounted to, Boggs and the Granite Company were given credit for them, so that none of these payments entered into the aggregate sums I have named that remained unpaid when he left the bank; and, after allowing him credit for all the payments that were made, there still remain the amounts that I have named as the aggregate of his indebtedness."

Boggs himself testified:

"Commencing with June 28th, 1910, I did a good deal of business with the Farmers' Savings Bank at Morrison. That business consisted in borrowing money. A number of contracts were left there. My arrangement was that I was to

have the entire charge of these contracts in the way of collecting them, and they went into our general fund and the discounts were made on the face of the notes and payments were made on the notes themselves. The notes I gave there were discounted from 16 to 80 per cent. The average rate of discount was not far from 16 to 20 per cent. Possibly but two short time notes were discounted as high as 80, late in the period. Those discounts went right into the obligation, taken out in advance and became a part of the notes. That is, supposing a note was given for \$2,500, I did not receive \$2,500 in cash. The amount of the discount was deducted from the face of the note and I was given the difference. The note was made to cover the actual cash advanced and the discount, so that the obligation to the Farmers Savings Bank included those high discounts and constituted a part of our liability there. We continued to do business with the Farmers' Savings Bank of Morrison, borrowing money, paying notes, receiving contracts, etc., until about the 1st of January, 1912. I think we had no loans from the bank after the 1st of September, 1911. We did make payments during the fall of 1911, up until the close of January, 1912."

The statements by Boggs as to the discounts exacted by plaintiff bank are denied by the officers of the bank, who testified that no such were had, and the jury had the right to accept their testimony to the effect that the discounts did not exceed the usual rates.

As a matter of fact, McCloud and Boggs were practically insolvent at the time all these loans were made, and the liabilities of the firm were considerably in excess of its assets; but Boggs had faith that he could pull the business through when he took the active management thereof, and proceeded to act on that assumption, with the not unusual result. When the concern failed, sometime in January of the year 1912, and it became apparent that plaintiff would lose the money unless it could hold the defendant responsible on his letter before quoted, this action was commenced.

The petition is not bottomed on the thought that the defendant's letter is one of credit, or that it constitutes a guaranty, but proceeds upon the theory that the defendant was guilty of fraud and deceit, and that plaintiff suffered damage therefrom to the amount of money loaned to Boggs and his company, which was not recoverable from either; and it was on this issue that the case was tried. The defendant introduced no testimony, and the facts are not seriously in dispute; but the parties differ as to some of the inferences to be derived therefrom. As the verdict was in plaintiff's favor, he is entitled to the benefit of the strongest inference in his favor which may reasonably be drawn from the testimony adduced.

The facts necessary to be shown to justify a recovery for fraud and deceit are well known, and generally understood. It is incumbent on plaintiff to show: First, that the defendant made the representations charged, and that they were representations of fact, as distinguished from mere opinions; second, that such statements were false in fact, and that defendant knew them to be false, or that they were made as of his own personal knowledge, whereas, he in fact had no knowledge of the truth thereof, or that he had the means at hand of knowing of their falsity; third, that the representations were made with intent to deceive the party to whom made; fourth, that the party to whom made did not know of their falsity, but, believing the same to be true, relied and acted thereon; and, fifth, that he was damaged thereby.

The trial court instructed upon the first proposition as follows:

"The material part of this letter, and the one to which your attention is particularly directed, is the third representation above set out; that is, that the Central Iowa Granite Co. and E. A. Boggs were, at the time of the writing of the letter, thoroughly reliable, and good for any arrangements which they might make with the bank. As to the construction which should be given the language of the defendant in making such

representation, you are instructed that such representation so made by the defendant was a representation by him that the Central Iowa Granite Company and Mr. Boggs were financially thoroughly reliable, and that they were able financially to meet and pay any obligation which they might enter into with the Farmers' Savings Bank, in carrying on and transacting the business of the Central Iowa Granite Co."

This instruction is challenged; and in the same connection it is argued that defendant's motion for a directed verdict, filed at the close of plaintiff's testimony, should have been sustained, for the reason that none of the statements made in the letter are of facts, but, at most, mere expressions of opinion regarding the parties referred to therein. I am of opinion that the letter is fairly susceptible of the construction placed upon it, and that it did affirm the financial ability and responsibility of the Granite Company and of Boggs; that they were thoroughly reliable and good for any arrangements they might make with plaintiff.

It is sometimes difficult to distinguish between the expression of an opinion and of a fact; but courts generally hold that a statement as to the solvency or financial responsibility of a third person is a statement of fact, and not the mere expression of an opinion. *Einstein v. Marshall*, 58 Ala. 152 (29 Am. R. 729); *Marsh v. Falker*, 40 N. Y. 562.

In the *Einstein* case, *supra*, the court says, at page 737:

"Much must depend on the circumstances of the particular case. But when, as in this case, the person recommending knows that the object of the party procuring the recommendation is to obtain credit at a distance, knows that the proposed seller is unacquainted with the financial condition and credit of the proposed buyer, the law, in harmony with good morals and good neighborhood, requires that the same shall be faithfully and truthfully given. A representation, as fact, of that which the party knows to be false, or of that of the truth of which he has no knowledge or well-founded belief, falls below the standard of legal requirement. And if it turn out in

fact that the representation is false, and the seller is deceived and suffers loss in consequence of the sale he made on the strength of it, the party recommending must make good the loss. It is no excuse for him that he did not collude with the purchaser, that he was not interested in or benefited by the purchase, or that he did not know whether the representation he made was true or false. Good faith requires that what he represents as fact shall be true, or that, from a proper knowledge of the surroundings, he is justified in having an intelligent belief that what he asserts is true. Mere spirit of accommodation, or desire to serve a friend, we fear, cause many recommendations, which entail heavy loss on him who trusts, and is misled by them. It is time it should be known that he who thus knowingly, fraudulently, or even recklessly, enables one to cheat another, thereby shoulders the burden himself. Candor and good faith are what the law requires, for the law does not convert a mere recommendation into a guaranty. . . . When, however, the testimony convinces the jury that the recommendation was knowingly false, and on the strength of such recommendation credit was given and a loss sustained, these, with the fact that the statements in the recommendation were false, constitute deceit and a right of action in favor of the person who was influenced thereby. And when given recklessly, or from favoritism, without knowing whether it is true or false, attended by the circumstances above postulated, these are proper facts, with the other testimony in the cause, to be weighed by the jury in determining whether or not the defendant was guilty of the deceit charged, and, unexplained, would authorize a verdict in favor of the plaintiff."

This rule has its foundation in the old English case of *Pasley v. Freeman*, 3 T. R. (K. B. 1789) 51 (12 English Ruling Cases 235), and it has been generally adopted in this country. See *Crane v. Elder*, 48 Kans. 259; *Cowley v. Smyth*, 46 N. J. L. 380.

Even in Massachusetts, where a different rule is said to

prevail, the Supreme Court of that state, in *Andrews v. Jackson*, 168 Mass. 266, said:

"It is contended by the defendant that such a representation is necessarily, and as a matter of law, a mere expression of opinion, for which, however wilfully false, and however damaging in the reliance placed upon it, no action can be maintained. It is true that such a representation may be, and often is, a mere expression of opinion. But we think that it may be made under such circumstances and in such a way as properly to be understood as a statement of fact upon which one may well rely. In *Stubbs v. Johnson*, 127 Mass. 219, one of the representations in regard to a note was that it was 'as good as gold,' and the jury were instructed that, if this was intended as a representation of the financial ability of the maker of the note, it was a statement of a material fact, for which the defendant was liable. This instruction was held erroneous, 'because a representation as to a man's financial ability to pay a debt may be made either as a matter of opinion, or as a matter of fact; the subject of the statement does not necessarily determine which it is.' 'It is often impossible,' says Mr. Justice Colt further in the opinion, 'to determine, as matter of law, whether a statement is a representation of a fact, which the defendant intended should be understood as true of his own knowledge, or an expression of opinion. That will depend upon the nature of the representation, the meaning of the language used, as applied to the subject matter, and as interpreted by the surrounding circumstances, in each case. The question is generally to be submitted to the jury.' The opinion plainly implies that, if the jury had been left to determine whether there was a representation of the maker's financial ability to pay made as a matter of fact, and not as mere matter of opinion, they might have found against the defendant on his false representation that the note was 'as good as gold.' In *Belcher v. Costello*, 122 Mass. 189, there is also a strong intimation that the rule is as above stated. In *Saf-*

ford v. Grout, 120 Mass. 20, the representation set out in the declaration was that the maker of the note 'was a person of ample means and ability to pay said note, and that the note was good.' The plaintiff was allowed to recover. The court says of the representations: 'We must presume that they were legally sufficient to support the action; that is to say, that they were statements of facts susceptible of knowledge, as distinguished from matters of mere opinion or belief.' See also *Morse v. Shaw*, 124 Mass. 59; *Teague v. Irwin*, 127 Mass. 217.

"In two recent cases—*Way v. Ryther*, 165 Mass. 226, and *Kilgore v. Bruce*, 166 Mass. 136, 138—this court has expressed a disinclination to extend the rule which permits dealers to indulge with impunity in false representations of opinion. In the case now before us the notes were turned over to the plaintiff in part payment of the agreed price for land sold to the defendant. He professed to know, and probably did know, all about the financial standing of the maker of them, who lived in Boston. The plaintiff lived in a suburban town, and knew nothing of the maker. She was obliged to take the defendant's representations or to decline to deal with him until she could go to Boston and make an investigation for herself. He told her that he had lent money to the maker, and said, 'Do you suppose I would lend my money to anyone that was not good?' A representation that a note is as good as gold may be founded on absolute personal knowledge of the validity of the note, and upon an equally certain knowledge of the maker's financial ability. The known facts upon which financial ability depends may be so clear and cogent as to make the consequent conclusion, which ordinarily would be a mere matter of opinion, a matter of moral certainty which can properly be called knowledge. We cannot say, as matter of law, that this representation was not intended to be, and properly understood to be, a representation of facts within the defendant's knowledge."

We have often affirmed the same doctrine. *McKown v.*

Ferguson, 47 Iowa 636; *Shuttlefield v. Neil*, 163 Iowa 470; *Davis v. Central Land Co.*, 162 Iowa 269; *Haigh v. White Way Laundry Co.*, 164 Iowa 143; *Hetland v. Bilstad*, 140 Iowa 411; *Severson v. Kock*, 159 Iowa 343.

And, as a rule, one speaking regarding the financial ability of another is held to a stricter accountability than if he were speaking of his own standing. *Lyon v. Briggs* (R. I.), 51 Am. Rep. 372. In the case relied upon by appellant, *Albion Milling Co. v. First Nat. Bank* (Neb.), 89 N. W. 638, the representations were that the party "seemed to be doing well;" that "as far as he knew he was getting along nicely;" "I should say he would be good for that amount." These were all guarded expressions of opinion or belief, and not assertions of any fact.

II. There was sufficient testimony to show that, at the time defendant made the statements in the letter, neither the company nor Boggs nor McCloud was financially responsible, and that they were each, in fact, insolvent; there was also testimony from which a jury might have found that neither was responsible in fact.

III. Upon the question of defendant's knowledge of the condition of the firm and its members at the time he made the statement, the testimony is not strong. It consists of two letters written by defendant in May of the year 1910, and proof of their reputation as to financial irresponsibility, in the city of Waterloo.

In one of the letters, in referring to a note against the Granite Co., sent to defendant's bank for collection, defendant said: "Boggs is out of the city most of the time, but will get right after him and report the outcome." And in the other, referring to the same matter, he wrote: "We will make allowance on Granite Co. note as instructed. I have gone after these people as hard as I can, but they are hard to get money out of." In addition to this, it was shown, over defendant's objections, that the general reputation of Boggs at Waterloo, Iowa, on or about July 1st, as to his

solvency and financial responsibility, was not good; and that the reputation of the Granite Co. at the same time was that they were very light financially. Again, it is shown that defendant knew the weak financial condition of the firm and of Boggs on December 24th, at a time he took up a note which he had negotiated at another bank, some time in June of the year 1910.

Other witnesses testified as to the reputation for insolvency of both the firm and of Boggs on or about July 1, 1910. Whatever else may be said of this testimony as to the reputation of the firm and of Boggs, it was certainly material as bearing upon the question of defendant's knowledge of the facts. Jones on Evidence (2d Ed.), Sec. 146; *Martin v. Mayer* (Ala.), 20 So. 963; *Hahn v. Penney*, 60 Minn. 487; *Lee v. Kilburn*, 3 Gray (Mass.) 594.

Whether or not such testimony is admissible to prove the fact of solvency, we need not at this time determine. It has been held admissible, however, by a great number of reputable courts. *Sweetser v. Bates*, 117 Mass. 466; *Ellis v. State* (Wis.), 119 N. W. 1110; *West v. St. Paul Nat. Bank*, 54 Minn. 466 (56 N. W. 54); *Bank of Middlebury v. Rutland*, 33 Vt. 414. Contra, *Stewart v. McMurray* (Ala.), 3 So. 47; *Phillips v. Bullard*, 58 Ga. 256; *Graff v. Brown*, 85 Ill. 89.

The testimony regarding defendant's knowledge of the insolvency in December, 1910, was admissible, as explanatory of defendant's conduct with Boggs and his firm, and with those who held their paper. But aside from the question of defendant's actual knowledge, there was enough to take the case to the jury, on the theory that defendant's statements in the letter purported to be based upon actual knowledge; and if he in fact did not know whether they were true or false, he is held liable for his deceit, on the theory that his assertion of knowledge, when in fact he did not know, is quite as culpable as if made with actual knowledge of their falsity. See *Davis v. Central Land Co.*, 162 Iowa 269, and the many cases cited. Whatever of conflict there may be, either real or apparent,

regarding this proposition, is now made clear by this last decision, and the rule there announced is the one supported by the great weight of authority.

Appellant's counsel learnedly contend that, where the statement is in the nature of an opinion, the rule just quoted is inapplicable, and that, in such cases, to establish *scienter*, it must be shown, not only that the statement was false, but that the party making it had no reason to believe it to be true, relying upon *Boddy v. Henry*, 113 Iowa 462, and other like cases. The rule there announced is inapplicable here. All that plaintiff need do, in the first instance, in any event, is to show that the statement was false in fact; that the defendant knew it to be false, or that he assumed to have knowledge of the truth, when in fact he did not have such knowledge. *McKown v. Furgason*, 47 Iowa 636; *Davis v. Central Land Co.*, *supra*.

In this case, the letter itself shows that defendant was speaking of his own knowledge, and, the falsity of the statement being shown, this was all that plaintiff was required to show, in the first instance. Whether or not defendant's honest belief in the truth of the statements would exculpate him, we have no occasion now to decide. It may be said, however, that defendant is not to be charged for mere negligence. It must be shown that he either knew that the statements were false when he made them, or that he represented and assumed to have had knowledge, when in fact he did not.

Properly understood, and as explained in subsequent cases, the rule in *Boddy v. Henry*, *supra*, does not run counter to the one here announced.

IV. Counsel vigorously contend that there is no proof of any intent on the part of defendant to deceive or defraud. Such fact can rarely be proved by direct testimony, and hence the rule that such intent may be inferred; and if it be shown that the representations were false in fact, were known to the defendant to be false, and were made with intent that they

be acted upon, and in truth they are relied upon, intent to deceive and defraud may be inferred. This presumption or inference is not conclusive, but is sufficient to justify a jury in finding that this element essential to a recovery is established. *Davis v. Land Co.*, *supra*. *Boddy v. Conover*, 126 Iowa 31; *Riley v. Bell*, 120 Iowa 618.

No bad motive on the part of defendant need be shown, nor need any benefit to him be proved. *Skeels v. Porter*, 165 Iowa 255; *Hubbell v. Meigs*, 50 N. Y. 480; *Cowley v. Smyth*, 46 N. J. L. 380; *Fitzsimmons v. Joslin*, 21 Vt. 129; *Spencer v. Taggart*, 162 Iowa 564; *Stoney Creek Co. v. Smalley*, 111 Mich. 321.

V. Upon the question of the measure of damages, the trial court instructed as follows:

"If, under the evidence in this case and the rules of law announced in these instructions, you find the plaintiff entitled to recover against the defendant, you will then determine the amount of damages, if any, to which the plaintiff is entitled. And, upon the question of the amount, if any, which the plaintiff is entitled to recover of the defendant, you are instructed that it can only recover of the defendant the damages, if any, which the plaintiff has sustained, which are the direct and immediate consequences resulting to said bank, by reason of said bank, or its cashier, E. H. Reimer, relying and acting upon the representations made by the defendant, as to the financial responsibility of the Central Iowa Granite Co., and E. A. Boggs. In this connection, it is claimed by the defendant that the loan made by the plaintiff bank to the Central Iowa Granite Co. and E. A. Boggs were all made by the plaintiff in violation of law, and in amount beyond the authority of the bank to make, and in consideration of a large and unusual rate of interest and discount, and not in reliance upon any representations made by the defendant. Upon this question, you are instructed that if you find from the evidence that the loans, if any, made by the plaintiff to the Central Iowa Granite Co., and to E. A. Boggs, were in violation of

law, and in sums beyond the authority of the bank to make, such fact will not relieve the defendant from liability for damages sustained by the bank, if you find such damages to be the direct and immediate consequences resulting to said bank by reason of said bank, or its cashier, relying and acting upon the representations made by the defendant, and you find the defendant liable to the plaintiff under the evidence and the instructions given you by the court."

The majority say, first, that there was no testimony to justify this instruction. Next, that it is wrong in that defendant's liability, if any, could not exceed \$2,000; and lastly, that, as Boggs, or the Granite Co., or both, paid plaintiff more than \$2,000, no recovery can be had of the defendant.

To these conclusions, I cannot agree, and I think the majority overlook the nature of this action, and, consciously or unconsciously, treat it as an action upon a letter of credit, or a guaranty. If it were that, I might, perhaps, agree to the conclusion; but it must be conceded that the action is in tort, for deceit, and not for a breach of contract.

The fundamental difference between me and the majority is bottomed upon this distinction. If the majority would concede that this is an action of tort, and cite cases of that kind, rather than authorities in actions for breach of contract, we could come nearer to an agreement. But, as they make no distinction between the two kinds of action, I cannot, of course, agree to the conclusion reached.

That the measure of damages is different in the two classes of actions is elementary. The statute, Code Supplement, 1913, Section 1870, says that no liability of any person or firm for borrowed money shall at any time exceed 20 per cent. of the actually paid-up capital stock of the bank. The making of an over-loan is not made a criminal offense by statute. The provision was enacted for the benefit of the stockholders and depositors, and failure to comply with its terms in no manner affects the validity of an over-loan. *Benton County Sav. Bank v. Boddicker*, 105 Iowa 548; *Mills County Nat. Bank v. Perry*,

72 Iowa 15; *Gold-Mining Co. v. National Bank*, 96 U. S. 640; *Portland Nat. Bank v. Scott* (Ore.), 26 Pac. 276. The statute cannot be used to defeat the loan, nor may one guilty of a fraud hide behind it. *O'Donnell v. Providence & W. B. Co.*, 6 R. I. 211; *Kelly v. Muhs Co.* (N. J.), 59 Atl. 23.

A jury was justified in finding that the fraud was not the remote, but the proximate, cause of the loan; and the loans themselves were not invalid, even though greater than the statute authorized. The law was not enacted to protect one from the consequences of his own fraud or wrong, and the transaction was not illegal, in such sense that the parties themselves could avoid the contract. If they could not, then it is clear that a stranger to the transaction is not entitled to the benefits thereof. That is to say, the statute was not enacted for the benefit of those who might induce another to make loans of a bank, and the bank owed no duty, under the statute, to anyone but its depositors and stockholders. It is clear, I think, that the statute affords the defendant no protection. If the suit were upon a letter of credit or upon a guaranty unlimited as to amount, perhaps another rule would apply, for the reason that a loan within the limits of the statute would be held to have been within the contemplation of the parties. But the rule is not thus confined or limited, in actions of tort. The damages in such cases are those which directly and proximately follow as a result of the wrong, no matter whether contemplated or anticipated by the parties. *Fottler v. Mosseley* (Mass.), 70 N. E. 1040.

Whether or not the fraud of the defendant was the proximate cause of plaintiff's loss, or whether it relied upon Boggs or the Granite Company; and whether or not it was justified, in reason, in so doing, were questions of fact for the jury, and the court correctly instructed upon this feature of the case.

That there is a marked distinction in the rule for admeasuring damages in actions for breach of contract and in actions sounding in tort is so fundamental that it is scarcely necessary to cite authorities for the proposition. In the former,

the rule is that the damages are such as either naturally, that is, in the usual course of things, follow from such a breach of contract itself, or, on the other hand, such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of a breach thereof. *Menizer v. The Western Union Tel. Co.*, 93 Iowa 752; *Hadley v. Baxendale*, 9 Excheq. 341; *Hopkins v. Sanford*, 38 Mich. 611; *Billmeyer, Dill & Co. v. Wagner*, 91 Pa. St. 92. While, in actions for tort, all damages which result from the defendant's wrongful act are properly chargeable to him, and it is entirely immaterial whether the particular consequences of his act could have been foreseen or were contemplated by the wrongdoer (*Vosburg v. Putney*, 80 Wis. 523; *Sloan v. Edwards*, 61 Md. 89), it is certain that, in actions for tort, the defendant should be held liable for the consequences of his act, although he, at the time, neither foresaw nor had them in contemplation. *Guille v. Swan*, 19 Johns. (N. Y.) 381; *Ehrgott v. Mayor*, 96 N. Y. 264. The case last cited contains probably the best discussion of the rule. It follows that, in actions for tort, the question of the amount of damages, and as to whether they were remote or proximate, is primarily for a jury. Doubtless, but for the statute (Code Supplement, 1913, Section 1870), the majority would concede these doctrines and hold the defendant liable, or at least agree with me in saying that the questions were for a jury. But construing this as if it made over-loans unlawful, or else reading the statute into defendant's representations, as if they were to be considered contractual in character, they limit recovery in any event to \$2,000. That the statute does not impose a criminal liability and does not say that violation thereof is a misdemeanor is too clear for argument, and so I pass that by. I have never before seen it stated that statutory or other law should be read into false and fraudulent misrepresentations. Of course, this may be the law, although I have not before seen it announced; but if it is, there should be some authority for it. The majority have found none and,

after diligent search, I have been unable to discover any. Let us see what this means. Does it mean that I may practice deceit upon another, fraudulently induce him to part with his money, and then say, "Well, I am not responsible, for the reason that I did not think you would take me at my word, and I had no reason to believe you would make an over-loan?" If so, then what becomes of the rule that it is entirely immaterial whether the resulting damages were foreseen, or whether they were in the contemplation of the parties when the fraud was perpetrated? As already stated, this statute is not a penal one. It was enacted for the benefit of the stockholders and depositors of the bank, and not for the benefit of one who induced the bank to make over-loans. As construed by the majority, it is made to operate to their prejudice, at the same time conferring a benefit upon a wrongdoer. Such statutes are not new, and they have uniformly been applied for the benefit of the bank, its stockholders and patrons. See cases hitherto cited.

The majority overlook, or fail to mention the fact, that this matter is already foreclosed in this jurisdiction, in the case of *Bank v. Boddicker*, 105 Iowa 548. That was an action on a bond given to indemnify the obligee from the failure of a principal to pay the plaintiff bank an indebtedness then owing, or which might thereafter be contracted by said principal to the bank. The bond was in the sum of \$5,000, but the obligor undertook to stand good for any future indebtedness of his principal. The obligors on the bond, defendants in the action, pleaded the statute on which the majority rely, as limiting their liability; but this court, in answer to that plea, said:

"As the capital stock of the plaintiff was but \$15,000, the amount of the bond was \$2,000 in excess of the sum which the plaintiff was authorized to lend to the firm, and the amount of its debts to the plaintiff when this action was commenced was nearly five times that which it was authorized to borrow of the plaintiff. It is argued that the firm and the

plaintiff violated the law in creating the debt, and that the sureties are thereby discharged. . . . It will be noticed that the statute does not make a loan of money in excess of the per centum named void, and the general rule applicable to loans of that character is that they are not void, the prohibition of the statute being intended as a rule for the government of the bank. *Union Gold-Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640; *Bank v. Perry*, 72 Iowa 15; *Pangborn v. Westlake*, 36 Iowa 546; *Bank v. Stemmmons*, 34 Ohio St. 142; *Bank v. Savery*, 82 N. Y. 291; *Duncombe v. Railroad Co.*, 84 N. Y. 190; *O'Hare v. Bank*, 77 Pa. St. 96; *Bank v. Fall*, 71 Me. 49; 27 Am. & Eng. Enc. Law 380, 381. Since it does not appear that the bond was given for an illegal purpose, and the plaintiff can enforce as against G. A. Miller & Sons the full amount of their debts, we are of the opinion that the defendants may be liable in this action for the full amount of the bond in suit."

Mark, this was an action on contract, so that the majority are driven to the point of overruling this case in reaching their conclusion, although they make no mention of it in the opinion as presented. In fairness, this case should be noticed, and, if it is to be overruled, there should be no hesitation about it. The profession is entitled to know whether that case still remains the law of the land. I shall not take the time to specifically refer to other cases announcing the same rule.

Consistently and logically, the majority, still proceeding as if the action were for breach of contract, conclude that, even if defendant were at one time liable for \$2,000, he should not now be held liable, because, at some time, the Granite Company, or Boggs, or both, paid the plaintiff bank that amount, and this payment should be treated as settling all damages, and no recovery can be had. I had never before seen this rule applied in actions of tort, although I concede that, in certain cases, it has been applied in actions for breach of contract. The application of it in this case pointedly brings to my mind the

fallacy of the main argument of the opinion. Under the rule announced, plaintiff could not recover if it at any time made an over-loan to the Granite Company or to Boggs, although that over-loan were immediately fixed up, and the final liability of the Granite Company or Boggs or both was but \$2,000, if, perchance, they or either had paid the plaintiff bank \$2,000, during the course of their dealings.

Manifestly, this cannot be the law. Suppose, for example, that, upon the strength of defendant's misrepresentations, the plaintiff had loaned Boggs or the Granite Company \$4,000 at one time, and that this had been paid, and thereafter, acting on the same representations, it loaned him or them \$2,000 which was not paid, and suit was brought for the \$2,000 damages suffered. Would anyone say that, because Boggs or the Granite Company had paid \$4,000, there could be no recovery? I understand the majority to so affirm. I cannot lend my consent to such a rule.

It should be noted that much of the liability of Boggs and the Granite Company grew out of the purchase by the bank of paper ostensibly taken by them, and was not, in any true sense, a loan. In this respect, the case is not to be differentiated from the *Boddicker* case, *supra*.

I agree to the reversal because of error in the tenth instruction, reading as follows:

"It is claimed by the plaintiff that the representations made by the defendant were continuing in effect, and upon such question you are instructed that the representations made by the defendant as to the financial responsibility of the Central Iowa Granite Co. and E. A. Boggs, were continuing in effect, and that the plaintiff had the right to rely upon such representations, and to act thereon at any time within a reasonable time after such representations were made by the defendant. And, if you find from the evidence that, within a reasonable time after such representations were made by the defendant, he learned and knew that the Central Iowa Granite Co. and E. A. Boggs were not financially responsible,

and that they were not able to meet any obligations which they might incur to the plaintiff bank, it was then the duty of the defendant to advise the plaintiff that said Central Iowa Granite Co. and E. A. Boggs were not financially responsible and were not able to meet any obligations which they might incur to the plaintiff."

The error here, in my opinion, is in treating defendant's representations as continuing ones. This would make them guaranties, and plaintiff's action is not bottomed on that theory. That this instruction was erroneous, see *Goldsmith v. Stern*, 84 N. Y. Supp. 869; *Hotchkin v. Third Nat. Bank* (N. Y.), 27 N. E. 1050; *Bradley v. Seaboard Nat. Bank* (N. Y.), 60 N. E. 771; *Lowdon v. Fisk* (Tex.), 27 S. W. 180; *Cortland Mfg. Co. v. Platt* (Mich.), 47 N. W. 330; *Reid, Murdoch & Co. v. Kempe* (Minn.), 77 N. W. 413; *Burchinell v. Hirsch* (Colo.), 39 Pac. 352; *Atlas Shoe Co. v. Bechard* (Me.), 66 Atl. 390. Much more might be said; but, as I agree to the conclusion, it is perhaps needless to encumber the records with any further protest.

PRESTON, J., concurs in this dissent.

J. E. HULL, Appellee, v. R. C. DANNEN, Appellant.

APPEAL AND ERROR: Assignment of Error—Sufficiency. An assignment of error will be disregarded which fails to point out, in some fairly definite way, *wherein* the lower court committed error; likewise one which is so broad as to embrace, generally, every act of the court in admitting or rejecting evidence. *Held*, the following were too indefinite to raise any question:

1. "The court erred in its ruling on the admission and exclusion of testimony as indicated in the bill of exceptions."
2. "The court erred in overruling defendant's motion for a new trial."

SALES: Warranties—Construction. A specific written warranty may be read in the light of the competent testimony. So held as to a written warranty of the soundness of a horse.

PRINCIPLE APPLIED: Plaintiff, before buying a horse, thought he discovered a slight enlargement of the left hind hock, but de-

fendant (the owner) insisted that there was none. Finally, defendant conceded that there might exist some enlargement, but insisted that it was not of a serious nature. Defendant then gave a written warranty "that no spavin will develop on the left hind hock inside of 10 months, and, if said spavin or enlargement should enlarge to make him unsound, I agree to take the horse back." *Held*, in the light of the negotiations, this writing meant that a rescission might be had: First, if a spavin should appear inside the 10 months; second, if, as a mere unusual enlargement, and not as a spavin, the defect should progress in such a manner as to make the horse unsound.

SALES: Warranties—Patent Defect. There may be an express warranty against the consequences of a patent defect. So held in the warranty of a horse.

Appeal from Marshall District Court.—B. F. CUMMINGS,
Judge.

MONDAY, APRIL 10, 1916.

ACTION at law for recovery of damages for breach of a written contract of warranty. Judgment for plaintiff, and defendant appeals.—*Affirmed.*

Bradford & Johnson, for appellant.

L. T. Shangle and *F. E. Northup*, for appellee.

WEAVER, J.—On May 23, 1912, defendant sold to plaintiff a certain stallion at the agreed price of \$350. As a part of that transaction, the parties entered into a written agreement as follows:

"GUARANTEE.

"I this day sold the stallion, Herperst, to J. E. Hull, and guarantee that no spavin will develop on the left hind hock inside of 10 months. If said spavin or enlargement should enlarge to make him unsound, I agree to take the horse back and return the price paid for him, said horse to be returned to me in as good condition otherwise.

"R. C. Dannen.

"J. E. Hull."

This action was brought, August 12, 1913, on the foregoing instrument. The petition alleges that plaintiff took the horse into his possession pursuant to his purchase; that a spavin did within 10 months develop on the left hind hock of the animal, and the sprain or enlargement referred to in the writing did enlarge in a manner to make such animal unsound; and thereafter, and within the period of 10 months from the date of the purchase, plaintiff notified defendant of the fact, and offered to return the horse to him in as good condition otherwise as when plaintiff received it, and demanded of defendant the surrender or return of the promissory note given him for the purchase price; but defendant refused to receive the horse or return the note. Plaintiff further says that, by reason of defendant's refusal to receive the horse, he has been compelled to keep, care and provide for it, and that the reasonable value of the service so rendered is \$20 a month. Upon the foregoing allegations, he asks judgment against defendant for \$570.

The defendant admits the sale of the horse to plaintiff as alleged and the execution of the writing sued upon, but denies that there has been any breach of the terms of the warranty. There was a jury trial, and verdict and judgment for plaintiff for \$510.

The only errors upon which appellant relies for a reversal are stated in his brief as follows:

“The court erred in its rulings on the admission and exclusion of testimony as indicated in the bill of exception. The court erred in overruling defendant's motion for a new trial. The court erred in giving instruction No. 8, which was duly excepted to at the proper time.”

The first and second of these specifications are not only too indefinite to call for any consideration by this court, but neither has been argued by counsel, and we pass them without further notice.

The instruction to which exception is taken is as follows:

“If you find from a preponderance of evidence that upon

1. APPEAL AND
ERROR: assign-
ment of error:
sufficiency.

the horse in question, bought by plaintiff of defendant, there did develop a spavin on the left hind hock within 10 months from the time of the sale, and that said spavin or enlargement did make the horse unsound, then there has been a breach of the conditional guaranty or warranty under which the horse was sold, and you should find for the plaintiff on this point."

2. **SALES: warranties: construction.**

Stating it in counsel's own language, the objection to the instruction is this: That the court, instead of using the words "did make the horse unsound," ought to have said, "should enlarge to make the horse unsound," because that is the language employed in the writing.

But the quotation which counsel here makes from the warranty is not complete. Referring to the instrument mentioned, we find, first, an unequivocal guaranty that no spavin would develop within 10 months; and if a spavin did so develop within that time, it would follow, as a matter of law, that defendant became liable upon his guaranty.

The next sentence does not serve to narrow or detract from the effect of the guaranty. The writing is somewhat awkwardly worded, but, read in the light of the testimony, its meaning and effect are not doubtful. When the parties were negotiating, plaintiff appears to have thought that he discovered a slight enlargement of the animal's left hock, but defendant insisted that there was none. Finally, defendant conceded that possibly there was an enlargement there, but that it was nothing of a serious nature. The sale was finally effected upon the basis of the written agreement: First, that no spavin should appear within 10 months; second, that, even if not a spavin, yet if, as a mere unusual enlargement, it should progress in such manner as to make the horse unsound, the sale might be rescinded upon plaintiff's demand. Upon breach of the guaranty against a spavin, plaintiff was entitled to rescind and return the horse, even though the writing had contained no reference whatever to the progress or increase of the enlargement to a condition of unsoundness. We do not think

it was intended that the liability of defendant should be determined by a tapeline measure of the horse's hock. Had that been the test, a measure would have been taken at the time.

The real thought was that plaintiff should be protected against the development of a spavin on the horse's hock and from other unsoundness which might result from the enlargement if not a spavin. The right of rescission in either event (that is, if there was a breach of the warranty in either respect) would have existed, even if not mentioned in the writing, and the fact that it was mentioned did not serve to limit or change the nature of that right.

It was, therefore, proper for the court, after quoting the written guaranty in full of its statement of the issues, to proceed, and state to the jury what facts or occurrences would operate as a failure of such warranty, and this is what the court did do in the instruction to which the exception is taken, and we think the form of its expression is not erroneous. That part of the agreement reading "if the spavin or enlargement should enlarge to make the horse unsound," carries with it the clear implication on part of the defendant that the horse is not then unsound by reason of the enlargement, and that defendant would hold himself ready for a rescission of the sale, if it should result in unsoundness within the time named.

The substance of plaintiff's claim is that a spavin did develop and unsoundness did result from the enlargement, and that he rescinded his purchase for that reason. The substance of the instruction was that, if the jury found these allegations to be true, then defendant was liable, and this we think is the law.

Counsel for appellant seem to think that the fact that plaintiff knew or suspected that something was wrong with the horse's hock at the time that he made the purchase makes a difference in his right to maintain this action. The fact that he believed or feared the horse was unsound was a very good reason why he should protect himself by obtaining a warranty, and

3. **SALES: warranty: patent defect.**

there is no rule of law which will deny him the right to rely thereon, or relieve the defendant from the obligation so assumed.

The action is at law, and no exception, save as to the one instruction above considered, has been preserved or argued upon any ruling made on the trial below. There is no claim or argument that the verdict is without ample support in the testimony.

It follows of necessity that the judgment of the district court must be, and it is—*Affirmed*.

EVANS, C. J., DEEMER and PRESTON, JJ., concur.

IN RE ESTATE OF ANN E. WHITTAKER, Deceased.

HAZEL WHITTAKER et al., Appellants, v. EDWARD F. COTTER,
Administrator, et al., Appellees.

JULIA MARTHA SANFORD, Appellee, v. ROY WHITTAKER et al.,
Appellants.

WILLS: Construction—"Equal Portion." The intent of the testator prevails, in the construction of a will, over (a) any arbitrary or technical rules of construction, (b) the form of the will, and (c) the order in which the devises are given. The construction of the will in question held to evince an intention to divide the devisees into two distinct classes and to give each class an "equal portion," even though one class embraced but one person.

PRINCIPLE APPLIED: Testatrix, a widow, was survived by one daughter, who had a surviving son, and by two other grandchildren, who were children of a deceased son, William W., who died prior to the making of the will. The will provided: "I hereby grant unto my daughter (naming her) an equal portion of my property both real and personal. . . . The balance of all my property real and personal to be given share and share alike to her children and to the children of William W. Whittaker, deceased." *Held*, the daughter constituted one class of devisees and took one half of the property, while the three grandchildren constituted another class, and each took one sixth of the property.

Appeal from Pottawattamie District Court.—E. B. WOODEUFF,
Judge.

MONDAY, APRIL 10, 1916.

ACTION to construe a will.—*Affirmed.*

Earl R. Ferguson and *C. R. Barnes*, for appellants.

John M. Galvin, for appellees.

GAYNOR, J.—A determination of this appeal involves the consideration of two separate proceedings. The first grows out of the report of the executor of the estate of Ann E. Whittaker, in which is prayed for and given a construction of a will executed by her. The construction given is complained of by appellants, Hazel Whittaker and Roy Whittaker. The second proceeding involves the partition of the real estate left by Ann E. Whittaker, and also involves a construction of the same will, in so far as it affects the distribution of the proceeds of the property partitioned and sold.

WILLS: construction: "equal portion."

In the probate proceedings, as well as in the partition suit, Julia Martha Sanford claimed that, under the will, she was entitled to one half of the property left by decedent, and that Roy Whittaker, Hazel Whittaker and Charles F. Sanford were entitled to the other half, each to an undivided one sixth. The appellants, Roy Whittaker and Hazel Whittaker, in both proceedings deny that Julia Martha Sanford is the owner of one half of the said estate under the will, and claim that Roy and Hazel Whittaker and Charles F. Sanford are each entitled to one fourth of said estate; that Julia Martha Sanford was either not entitled to any portion of said estate, because of the indefiniteness in the will, or that she was entitled to only one fourth, or an equal share with the other persons named in the will.

There is no controversy as to the relationship of each of the parties to Ann E. Whittaker, the testatrix. Julia Martha

Sanford is the only surviving child of the testatrix. Charles F. Sanford is the son of Julia. The appellants, Roy Whittaker and Hazel Whittaker, are respectively the son and daughter of William W. Whittaker, a son of Ann E. Whittaker's, who died prior to the making of the will.

Ann E. Whittaker, the testatrix, died in Council Bluffs in the year 1903, and at the time of her death was a widow. She left surviving her Julia Martha Sanford and the three grandchildren hereinbefore named. At the time of her death, she left a will, which was executed on the 11th day of April, 1903, and was duly admitted to probate. By the terms of her will, she disposed of all her property to the parties named in the will. The grandchildren are not named in the will, but are spoken of as children of her daughter and her deceased son. The will is in the following language, and duly witnessed:

"I, Ann E. Whittaker, being of sound mind and aware of the uncertainties of life hereby declare this to be my last will and testament. First, I wish and hereby grant unto my daughter, Julia Martha Sanford, an equal portion of all of my property both real and personal which I may die seized. The same to be paid over to her as soon as possible after my death. The balance of all my property real and personal to be given share and share alike to her children and to the children of William W. Whittaker, deceased, when they are 26 years of age. The income to be divided yearly among them for their support and comfort. My household furniture, wearing apparel and jewelry to be divided among my relatives as directed by my sister Naomi. Second. Should my daughter, Julia Martha Sanford, not survive me then her share to go to the children as above directed. I hereby appoint my sister Naomi Dewey and my sister Emily R. Rishton my sole executors without bond with power to sell and convey property either real or personal. Either of my said executors to act either jointly or separately and in either case their acts to be legal and good as hereby directed by me. My said executors to pay first all my debts and funeral expenses including doc-

tors' bills and erect a shaft to cost about \$100 at my grave to mark the resting place of myself and son."

The only question here under this will is, What portion of the estate passed to Julia Martha Sanford? Having determined that question, the interests of the other parties become fixed by the wording of the will itself.

It is conceded by both parties that the intention of the testatrix must control; that the will must be construed as a whole, and not in parts.

As said in *Richards v. Richards*, 155 Iowa 394:

"If there be any rule at present, it is that testator's intent, as gathered from the will, will prevail over any arbitrary or technical rules of construction; and that, no matter what the form of the will or the order in which the devises are given, testator's intent must prevail.

As said in *Elberts v. Elberts*, 159 Iowa 332:

"The will should be construed as a whole, and if possible, effect be given to each and every provision thereof, and to avoid, if possible, any construction or interpretation which would defeat the manifest purpose and intent of the testator, as expressed in the will."

See *Boekemier v. Boekemier*, 157 Iowa 372; *Imas v. Neidt*, 101 Iowa 348; *Kalbach v. Clark*, 133 Iowa 215.

It is apparent, therefore, that, in construing this will, it is our duty, if possible, to find in the wording of the will the intention of the testatrix as to the disposition of her property, and as to the manner of its disposition. It will be noticed that, in the first division of her will, and in the first disposition that she attempts to make in her will, she has in mind her daughter Julia. Therein she gives evidence of an intent on her part to give to this daughter something. She says "an equal portion of all my property." She next has in her mind her grandchildren. She does not mention them by name. She speaks of them as the children of her daughter before mentioned, and the children of her son William. What does she

mean when she says, "I give an equal portion to my daughter, and the balance to these grandchildren?" It is evident that she had in her mind a line of demarcation between her children, and we think that her intent can be gathered from the instrument itself, and this intent was to give an equal portion to the daughter, and another equal portion to the grandchildren, an equal portion to each class, separating them into classes, and the portion to the second class to be divided equally between the members of that class.

It is true that she does not make this line of demarcation as clear in her will as it might be made, nor does she speak of any of the devisees as her grandchildren. She is presumed, however, to know the relationship existing, and she gives to her daughter an equal portion with the grandchildren, thus dividing the property into two equal parts; and, after making the devise to the daughter, she says, "The balance of all my property real and personal to be given share and share alike to her children, and to the children of my deceased son," without naming or indicating a knowledge on her part of the number of the grandchildren surviving. If she had intended to make the disposition contended for by appellants, she would not have separated the disposition of her property as indicated in the will. She would have given to the daughter, to the children of the daughter, and to the children of the son, the entire property, share and share alike. This she has not done. She makes first a provision for the daughter; gives to her an equal portion of her estate; then provides that the balance, another equal portion, shall be divided among the grandchildren.

This is the construction placed upon the will by the court below, and we think it a fair interpretation of the intent and purpose of the testatrix as gathered from the will. We find no reason for interfering with the finding of the lower court upon this proposition, and both cases are therefore—*Affirmed*.

EVANS, C. J., LADD and SALINGER, JJ., concur.

ROSA STEWART JOHNSON, Appellee, v. E. G. TYLER et al.,
Appellants.

DEEDS: Action to Set Aside—Fraud—Degree of Evidence Nec-

- 1 **sary.** To impeach a solemnly executed deed to real estate on the ground of fraud, the testimony must be clear, satisfactory and convincing, and something more than a bare preponderance in the balancing of probabilities. Evidence reviewed, and *held* insufficient to justify the order of the lower court annulling a deed.

FRAUD: Fiduciary Relation—Action to Set Aside Deed—Evidence—

- 2 **Sufficiency.** Evidence reviewed, and *held* wholly insufficient to set aside a solemnly executed deed on the ground of fraud growing out of alleged fiduciary relations.

DEEDS: Action to Set Aside—Inadequacy of Consideration. Inade-

- 3 **quacy of consideration is not, of itself, ground for setting aside a deed.**

Appeal from Harrison District Court.—THOMAS ARTHUR,
Judge.

MONDAY, APRIL 10, 1916.

ACTION in equity to set aside a conveyance on the ground of fraud. The opinion states the case. Decree for the plaintiff in the court below. Defendants appeal.—*Reversed.*

Roadifer & Roadifer, for appellants.

J. A. Murray, for appellee.

GAYNOR, J.—This is an action in equity to set aside a quitclaim deed given by the plaintiff to E. G. Tyler. The relief prayed for is grounded upon alleged fraud, mistake and undue influence practiced upon the plaintiff by the said E. G. Tyler, to induce the execution of the deed. Hattie P. Tyler is the wife of E. G. Tyler, and it is alleged that, after

1. **DEEDS: action to set aside: fraud: degree of evidence necessary.**

the making of the deed by the plaintiff to the defendant E. G. Tyler, he conveyed the premises to his wife, for the purpose of hindering, delaying and defrauding his creditors, and especially to hinder, delay and defraud this plaintiff, and it is asked that such conveyance be set aside. In the hearing below, the relief prayed for, as against the defendant E. G. Tyler, was granted, and such deed canceled, set aside, and held for naught. From this, the defendant E. G. Tyler appeals. No decree was entered touching the deed executed by E. G. Tyler to his wife, the other defendant, but judgment was entered against both defendants for costs, and both appeal. As to the devolution of the title of the property in controversy, it appears that Frederick Geith, during his lifetime, was the owner of this property; that, when he died, he left a will, which was duly probated. By its terms, he gave to his wife, Mary Geith, who survived him, a life interest in the property, and to his children the remainder, share and share alike. That the plaintiff is the only daughter of Lizzie Geith Stewart, one of the children of the said Frederick Geith, and as such, under the will, took the interest of the said Lizzie, and became invested with a one-eleventh interest in the entire estate, subject only to the life estate vested in the wife of the said Frederick Geith. The property consisted of the E $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Sec. 3, Twp. 79, Range 43, Harrison County, Iowa.

Frederick Geith, the original owner of said land, died about 16 years prior to the commencement of this suit. Mary Geith, his wife, who was the life tenant, died on or about August 29, 1912. Upon her death, the plaintiff became entitled to an undivided one-eleventh interest in the above described premises, and was, at the time of the making of the deed, the owner of an undivided one-eleventh interest in said real estate. The deed to set aside which this action was brought was executed on the 16th day of November, 1912. The plaintiff received \$100 from the defendant as a consideration for the execution of the deed. Prior to the time of the execution of the deed, she had mortgaged her interest in the

property to Lloyd Fallon for \$120, and this was a subsisting lien upon her interest in favor of Fallon at the time of the making of the quitclaim deed.

The grounds upon which the plaintiff seeks to have the deed set aside are: That the defendant E. G. Tyler represented to her that her grandmother, Mary Geith, the life tenant, was still living at that time, and that plaintiff's interest was contingent and remote, and that her enjoyment of her interest was likely to come so far in the future that it was of little value; that, in truth and in fact, the life tenant had died nearly two months before the quitclaim deed was procured, and plaintiff had become and was the absolute owner in full of the interest hereinbefore set out; that her interest was of the value of \$700, and that the consideration paid was grossly inadequate; that she did not know, at the time, that the life tenant was dead, and did not learn of that fact until long afterwards; that, at the time of the execution of the deed, she was acting under a misapprehension both of fact and of law, and that, if she had known that the life tenant was dead, and that she had become invested with the legal title to her interest as devisee, she would not have made the deed; that the defendant did know this fact; that he represented himself to be a lawyer; and that he concealed both the death of the life tenant and the legal effect of the death upon plaintiff's rights, knowing that she was laboring under a misapprehension touching the same. Plaintiff further says that she relied entirely upon the knowledge and integrity of the defendant in signing the quitclaim deed; that she was unable to read intelligently enough to inform herself as to the character of the instrument that she was signing, and did not understand the nature and extent of the property which the instrument purported to convey; that the defendant knew the extent of her interest at the time of the making of the deed, and the value of such interest, and knew that plaintiff was reposing confidence in him, in his statements, and in his knowledge touching the matter.

The defendant Tyler admits all the facts touching the devolution of the title of the property, and that plaintiff made him a quitclaim deed of her interest therein; denies that she was unable to read intelligently and understand the nature and character of the instrument that she signed; denies that he made any statements to her such as are alleged by her; denies that the consideration was grossly inadequate; denies that plaintiff did not know of the death of the life tenant before the making of the deed; denies that any fraud or undue influence was practiced upon the plaintiff to induce her to execute the deed; denies that she was laboring under a misapprehension of any fact touching her right in the property in controversy, at the time that the deed was made.

Plaintiff testifies that she is 33 years old; that she resided in the vicinity of this property until she was 12 or 13 years old; that she first met the defendant Tyler at Omaha, at some place where she was working; that she learned that he was from Logan, and she there discovered who he was, and he there discovered that she was also from Logan; that he asked her if she knew anyone in Logan; that she said that she knew Lloyd Fallon to a certain extent; that she told him that she had done some business with Fallon and that he had been unfair to her, and he remarked that he would look into it; that he came back in about a week after that and told her that he was an attorney, and that he had some trouble with Fallon; that he would give her \$100 for a quitclaim interest in the property; that that was the only way that she could get even with Fallon; that she asked him if her grandmother, the life tenant, was still living, and he said, "Yes," she was living with Ed on a farm; that he told her that, if she would sign the deed, he would give her \$100, and he would make \$150 out of it himself. Plaintiff further testifies:

"I didn't know at the time I signed the deed that my grandmother was dead. I knew I was entitled to a one-eleventh interest. I knew when my grandmother died I would

get some money. I knew that when she died I would get my mother's share—a one-eleventh interest."

She further testifies that she had lived with her grandparents, the Geiths, until she was about 11 or 12 years of age, and knew something about the land; that she went to school until she was 14, when she went to Missouri Valley; that she went to Omaha when she was about 17; that she married a man in Sioux City by the name of Johnson; that he got a divorce from her, but she does not know when. She further testified that she was subsequently married to a man by the name of Pierson; that she always went by the name of Laura Holmes. She said that she went by that name when she was living with her first husband, and has gone by that name since her last marriage; that she was last married about two years before she testified. She says that she does not remember the date on which she married her last husband; thinks it is about two years ago; that she was not married to this last man at the time of the making of the deed. She testified:

"I acknowledged the deed before a notary public. I can read. I glanced at the deed, but did not read it thoroughly. I first learned of my grandmother's death when I called my uncle over the phone after there was an advertisement in the Omaha paper for me. My folks did not know where to find me. This was about a week or three or four days after the deed was made. My uncle made all the arrangements about commencing this suit. I guess I have told all the statements that Mr. Tyler made to me that induced me to sign the deed. I don't know whether the mortgage to Fallon is paid yet or not."

This is all the testimony given by the plaintiff bearing upon this question, and all the testimony offered by her touching the execution of the deed.

The testimony for the defendant was substantially as follows: The notary before whom the deed was acknowledged testified that he asked the plaintiff if she knew the contents

of the deed when she signed it, and she answered, "Certainly;" that, before he took the acknowledgment of the deed, he went to get his notarial seal; that, when he came back, she had the deed in her hand, and had it open, and she laid it back on the table when he came in.

Mrs. A. J. Carey, called for the defendant, testified that she lived in Omaha; was acquainted with the plaintiff; that the plaintiff goes by the name of Holmes; that she had known her about four years; that she knew Tyler; had some business with Tyler; that is, he attended to some business for her; that she talked with the plaintiff about disposing of her interest in her grandmother's estate; that, when she came home, after executing the deed, she told that she had gotten \$100; that she asked her why she didn't get more. She answered:

"My folks have never done anything for me—just kicked me around, and I just beat them to it. I would have sold it for less just to beat them to it."

That, when the plaintiff saw the advertisement in the paper to which she refers, she remarked:

"What do you think of the nerve; because I have disposed of the land, they want to try to get it back."

She further testified:

"I heard Tyler and the plaintiff talk about the transaction before the deed was made. He told her about her grandparents. He said her grandparents were dead. She told him who her grandparents had been living with—a couple of sons. I heard him tell the plaintiff that he was an abstracter."

Letters were introduced by the defendant written by Fallon to the plaintiff, from some of which it appears that she had been seeking to sell her interest in the property as early as 1902. A letter written by Fallon on November 10, 1902, reads:

"Replying to your favor of November 4th relative to the interest you have in the 80-acre tract of land belonging to your grandfather's estate, will say I am not in a position to buy any part of it at this time. It is worth more than \$150 now,

perhaps twice that amount, but no one can tell on account of your grandmother's death, as I have told you before. She holds it as long as she lives, then it can be sold and divided, and not until then. You should not want to sell it now, but hold on to it, then you will be able to get more out of it."

In 1903, she sought to obtain a loan from Fallon of \$35 and secure it on the land. He wrote her that he could not make the loan, but would try to induce her uncle to purchase her interest for \$250. In March, 1904, he wrote her that he had made the proposition to the uncle, and that the uncle had turned it down. He then advised her to let the matter stand until her grandmother's death, and then she would get her share.

The defendant testified that he met the plaintiff in Omaha, as testified to by her; that she was going by the name of Laura Holmes; that he had a conversation with her touching the property before the day that the deed was executed; that he was engaged at that time in ferreting out for Mrs. Carey her ownership in certain property in New Hampshire, Massachusetts; that the plaintiff then told him that she was from Harrison County; that he went down to Omaha on the 16th day of November, and had a conversation with her touching the purchase of this land; that she asked \$50, said that she would rather have \$50 than \$500 a few years later; that, after he investigated, he went down there on the 16th; that they went to a restaurant and had supper, and talked over the proposition; that the conversation was a continuation of the conversation started on the Wednesday preceding; that she told him that she was entitled to a one-eleventh interest now that the old lady was dead; that he asked her about claims against the estate, and also if she was married; that she said she was unmarried; that, when he met her on the 16th, he was prepared to accept her proposition; that he showed her the deed, and she read it over; at least, took time enough to read it over; that thereafter they executed the deed, and he gave her \$60 in money and a check for \$40; that, in the conversa-

tion had, she told him that her mother was dead. This was in the first conversation.

"She asked me where her grandmother was buried, and I told her if she wanted to know I would find out. I never told her that her grandmother was still living. At the time I bought the land it was worth, in my judgment, not to exceed \$65 an acre. I told her her grandmother died in August preceding."

The quitclaim deed in controversy contains this provision:

"I hereby quitclaim my interest in the estate of Frederick Geith and Mary Geith, who were my grandparents, and my interest in the real estate of which they died seized." (Here follows a description of the real estate.)

It contains also the provision:

"All claims of equity I may have or hereafter acquire therein, and against one L. W. Fallon, of Logan, Iowa, who acted as attorney in the first of said estate."

And the further provision:

"I covenant with the grantee herein that my mother, Eliza Stewart, the wife of William Stewart, was a daughter of said Frederick Geith and Mary Geith, his wife; that my said mother died before the death of her parents, and left no heir or heirs other than myself."

The only testimony as to the value of the land, other than the testimony of the defendant, herein set out, was given by the plaintiff's uncle, who testified that the reasonable market value of the land on November 16, 1912, was around \$100. On cross-examination, he said that it sold at the referee's sale in 1914 at \$92.50; that land in that vicinity went up during the years 1912 and 1913; that, during the years 1912 and 1913, land in that vicinity advanced all the way from \$10 to \$20 an acre.

Lest it be thought that in setting out the testimony of Mrs. Carey we have overlooked the cross-examination appearing in the amendment to the abstract, we will say that there is nothing in this cross-examination that militates against the

statements made by her on direct examination. It only indicates the hedging of the woman's mind against the imputation of being over-curious, prying or inquisitive, and detracts nothing from the statements originally made in her direct examination, as hereinbefore set out.

The only question raised involves the sufficiency of the evidence to justify the court's decree. The case is triable *de novo* here. We have read the record with care. All facts material to this controversy, disclosed by this record, are set out.

There are only two facts that the evidence of the plaintiff tends to show, upon which she predicates her right to the relief prayed for: (1) That the defendant stated to her that her grandmother was still living; that her available interest was contingent upon the death of her grandmother; that she did not know this fact. (2) That the consideration was grossly inadequate.

That the plaintiff knew the character and location of the property conveyed and her exact interest therein, this record discloses without any controversy. That she knew that she would own an undivided one-eleventh interest in the property in the event of her grandmother's death was also well known to her at the time. That the grandmother had a life interest in the estate which would terminate upon her death was also known to her. That, upon the death of her grandmother, the one-eleventh interest would become vested absolutely in the plaintiff was known to her. She had some information touching the value of her interest in the real estate. She had corresponded with Fallon touching this fact, and had some information on that point. That she was anxious to realize her interest in this property and convert the same into money as soon as possible is made manifest by the record. She claims that she was deceived by the defendant concerning her grandmother's death. She affirms that he told her that her grandmother was not dead, and that the enjoyment of her estate, or any realization therefrom, might be far in the future. This

is the real ground of her complaint. This is the real basis of her action to set aside the deed. The burden was on her to establish it. Fraud is never presumed.

The deed was presented to her before it was signed. She could read. She had it in her possession with every opportunity to know its contents. She was not circumvented in any way. She says that she glanced over it. The notary testified that she said that she knew its contents before she signed it. She did sign it and acknowledged it, before the notary, to be her voluntary act and deed. There is no direct evidence of fraud, except the testimony of this complainant. She was 33 years of age; possessed ordinary intelligence; could read. She had been out in the world of men and things on her own resources for many years. The testimony discloses that she had offered the land on the Wednesday preceding the execution of the deed; that she wanted plaintiff to take it on that day; that he did not know who she was until he investigated, except from what she said; that he did not make her any offer on that day; that she spoke about it and wanted to sell it; that, after he had investigated and found out who she was, and that she was what she claimed to be, he came back to Omaha, and the deal was made.

The defendant testified, and plaintiff did not go on the stand to contradict him, that, before the deal was consummated, he advised her to write to an attorney; suggested Mr. Bolton, Mr. Fallon or Mr. Roadifer; that she said that she would not have anything to do with an attorney. He testifies:

"I suggested that she give power of attorney to me, but she said she wouldn't trust any man. She wanted me to make her an offer that day, and I did."

It is elementary that, in the absence of corroborating evidence or circumstances, a court is not justified in overturning a legal title, solemnly conveyed by written instrument, duly executed and acknowledged, upon the testimony of a single witness, when that witness is contradicted by the testimony of another equally credible, as to the existence of all facts

alleged and relied on as a ground for granting the relief prayed for. It is also well settled that courts will not grant relief on the ground of fraud, unless the fraud alleged and relied upon, which, if proved, would justify the court in granting relief, is established by clear, convincing and satisfactory evidence. See *Epps v. Dickerson*, 35 Iowa 301; *Ley v. Metropolitan Life Insurance Co.*, 120 Iowa 203. See *Schrimper v. Chicago, M. & St. P. R. Co.*, 115 Iowa 35, in which it is said:

"To justify a decree setting aside or reforming a deed because of the alleged fraud, the evidence must be clear and satisfactory. A mere preponderance of the evidence is not sufficient. Any other rule would be highly dangerous, and tend to weaken confidence in all titles."

This rule is so elementary that we need cite no further authorities in support of it.

The plaintiff and defendant were not on unequal ground. They were dealing at arm's length. No fiduciary relation existed, nor is there anything to suggest that the plaintiff reposed any special confidence in the defendant, or had a right to do so. He was a total stranger to her, and there is nothing to show that he sought to or did gain her confidence, or that he played upon her credulity. There

is no evidence that the plaintiff was mentally weak, or incapable of taking care of her own end of the deal. The contract is not unreasonable. Mere inadequacy of consideration is not ground for setting aside a conveyance. Whether she read the instrument or not is wholly immaterial to this investigation.

She agreed, and it was her intended purpose, to convey her interest in this real estate to the defendant for the consideration offered.

She signed and acknowledged the deed for that purpose. In the absence of clear and satisfactory evidence that she was induced to make the deed by and through fraud charged to have been used by the defendant, the deed is binding upon her.

2. FRAUD: fiduciary relation: action to set aside deed: evidence: sufficiency.

3. DEEDS: action to set aside: inadequacy of consideration.

We reach the conclusion, after a careful consideration of the whole record, that the decree of the district court was without support in the evidence, and that plaintiff's petition should have been dismissed, and the case is therefore reversed and remanded, with instructions to enter a decree conforming to this opinion.—*Reversed and Remanded.*

EVANS, C. J., LADD and SALINGER, JJ., concur.

WILLIAM R. KYLE et al., Appellants, v. EDWARD S. KYLE,
Appellee.

DEEDS: Delivery—Delivery to Third Person After Grantee's Death.

- 1 Depositing a duly executed deed with a third person, with directions to deliver the same to grantee upon the death of grantor, effects a complete delivery to grantee with enjoyment postponed.

DEEDS: Acceptance—Presumption in Case of Valuable Property.

- 2 The acceptance of a deed to valuable property is, ordinarily, presumed. So *held* where a son, grantee in a deed executed by the mother, and delivered to a third party with directions to deliver to grantee after her death, was present when the deed was executed and made no objections thereto.

WITNESSES: Competency—Transaction With Deceased. The

- 3 interest which will destroy the competency of a witness to testify to a transaction with a deceased must be *direct* and *present*. *Held*, a stockholder in a bank was not incompetent to testify to the facts attending the execution of a deed by deceased to grantee, simply because the grantee was a debtor of the bank.

DEEDS: Acceptance—Evidence. Evidence reviewed, and *held* in-

- 4 sufficient to show that grantee in a deed did not accept the same.

DEEDS: Acceptance—Acceptance After Death of Grantor—Effect.

- 5 The acceptance of a deed, with all the burdens carried thereby, made after the death of grantor (grantor having delivered the deed, when executed, to a third party, with directions to deliver to grantee after grantor's death) goes back to the time that said deed was left with said third party.

DEEDS: Delivery—Delivery to Third Party—Agency Created. The

- 6 act of the grantor in a deed in depositing the same with a third person, with no reservation of power in grantor to recall the deed,

and with directions to deliver the same to grantee after grantor's death, has the effect of constituting such third party the agent of the grantee in the holding of said deed.

Appeal from Sac District Court.—M. E. HUTCHISON, Judge.

MONDAY, APRIL 10, 1916.

ACTION in equity to set aside a conveyance made by the mother of the parties to the defendant. The trial court found the equities to be with the defendant, and dismissed the bill. Plaintiffs appeal.—*Affirmed.*

Charles D. Goldsmith and Cummins, Hume & Bradshaw,
for appellants.

Elwood & Tourgee, for appellee.

WEAVER, J.—On November 12, 1912, Caroline Kyle was the owner of 160 acres of land in Sac County, Iowa. She was a widow, with three daughters, Jane, Caroline and Lavinia, and three sons, William, Andrew and Edward. On the day named, she executed a warranty deed of the land to her son Edward, and at the same time executed a will. The papers were drawn by one Martin, a notary and officer of the Schaller Savings Bank, and when executed were left in the possession of said bank. The deed was made subject to a mortgage of \$6,500, assumed or to be assumed by the grantee, and contained a clause reciting the agreement of the grantee to support and keep the grantor without other compensation during the remainder of her life. The will provided legacies as follows: To Jane, \$400; Caroline, \$1,500; Lavinia, \$1,500; Edward, \$1.00; William, \$1,000; and the remainder of her estate was given to William and Andrew in a residuary clause reading as follows:

“Par. No. 7. To my sons, William R. Kyle and Andrew J. Kyle, I give and bequeath the balance of my property, both real and personal, to be divided equally between them.”

It should here be said that the testatrix left another farm of 160 acres in the same county, which appears to have passed to the plaintiffs by this residuary devise. Mrs. Kyle died in February, 1913, and the will has been duly probated.

Plaintiffs now bring this action, alleging that the deed was never delivered by the grantor or accepted by the grantee; that the grantor thereof never parted with her title to the land in her lifetime, but died seized thereof, and that, upon her death, it passed to plaintiffs under the residuary clause of her will. The defendant admits the making of the deed mentioned in the petition, and further alleges that, prior to the making of the deed, he had an express agreement with his mother, by which she was to convey the land to him in consideration of his undertaking to keep and support her during the remainder of her life, and in further consideration that he was to receive and accept the property so conveyed in full of his prospective right to share in the estate of which she should thereafter die seized or possessed. Defendant further avers that, by the terms of said agreement, his mother was to execute to him a deed for said land and deposit it in the Schaller Savings Bank, to be by said bank held until her death, and then to be delivered to him; that she did, in fact, execute the deed, and according to their agreement did leave it in the bank to be delivered after her death, and that, in pursuance of such direction, the bank did retain the deed until after the death of the grantor, and then delivered it to the defendant. Defendant further alleges that he fully performed his part of the agreement, by keeping and supporting his mother without other compensation during the remainder of her life. He further pleads the making of the will by his mother as above stated, and alleges that she made no provision therein for him except a nominal legacy of \$1, and divided all her estate then remaining between his brothers and sisters, and this distribution was made, excluding him from any substantial benefits under the will, in recognition of the fact that, on the same day and as a part of the same transaction, she had conveyed

the farm to him in full of his right to share in her estate. Defendant further pleads by way of estoppel that, after the death of the grantor, he filed a claim against the estate of the deceased, including therein certain expenses alleged to have been incurred in the last sickness of his mother; that plaintiffs appeared thereto by counsel and resisted the allowance of said claim, on the ground that, by the terms of the conveyance of the land to him, it was the duty of the defendant to pay said items without charge against the grantor or against her estate, and the court, having heard the evidence upon said issue, sustained the objection to said claim and ruled that, under the obligation assumed by the defendant in said deed, he was not entitled to a repayment of such expenses. Defendant therefore says that plaintiffs, having asserted the validity of the deed and of defendant's obligation therein assumed, and having claimed and received the benefits thereof by the rejection of the defendant's claim against their mother's estate, are now estopped to allege or prove that said deed was ineffective to pass the title to the land. In reply, plaintiffs admit that defendant filed a claim as stated, and that the same was rejected, but deny that they appeared in said proceeding or are in any way bound thereby. In turn, they allege that the act of defendant in filing and attempting to enforce said claim operated as an election upon his part to reject or disavow the conveyance made by his mother, and that he is estopped now to claim title thereunder. The issues joined were tried to the court which, after hearing all the evidence, found for the defendant and dismissed the plaintiff's bill.

I. The principal question presented by the appeal is the validity or invalidity of the deed under which the defendant claims title to the land, and this in turn depends upon whether, within the meaning of the law, the instrument was ever delivered. That delivery is essential to the effectiveness of a deed to real estate is elementary, but just what amounts to a deliv-

1. DEEDS: delivery: delivery to third person after grantee's death.

ery is sometimes a question of doubt. Ordinarily, it is the simple transfer of possession of the written instrument from the grantor to the grantee, with intent on part of the grantor to convey and on part of the grantee to acquire title to the property described therein. But an actual manual transfer of the paper is not necessary. A delivery may be effected by acts without words, or by words without acts, or by both words and acts. Assuming the instrument to have been properly executed ready for delivery, acts and words evincing intent to part with it and relinquish the grantor's right over it is a sufficient delivery. *Whiting v. Hoagland*, 127 Wis. 135; *Woodward v. Woodward*, 8 Halstead's Ch. (N. J.) 779, 784. It may be made direct to the grantee or to a third person in his behalf. *Owen v. Perry*, 25 Iowa 412; *Clarity v. Sheridan*, 91 Iowa 304; *Adams v. Ryan*, 61 Iowa 733; *Matheson v. Matheson*, 139 Iowa 511, 514. In final analysis, it may be said that delivery is a matter of intent, and any distinct act or word by the grantor with intent to pass the title to the grantee by transferring the deed to him or to another for his benefit is a delivery. *Collins v. Smith*, 144 Iowa 200, 203; *Kneeland v. Cowperthwaite*, 138 Iowa 193, 194; *Schurz v. Schurz*, 153 Iowa 187, 190; *Criswell v. Criswell*, 138 Iowa 607, 609. It is also well settled in this and other states that a deed duly executed and deposited with a third person with directions to deliver it to the grantee upon the death of the grantor is an effective conveyance; that such a deed vests the grantee with the title, but his right to possession and enjoyment is postponed until the grantor's death. In such case, the delivery which the law requires to make a deed legally effective is complete when the deed is placed in the hands of the depositary; but it does not become effective for the purposes of possession and enjoyment of the property until the time comes for the secondary delivery by the person to whose keeping it has been entrusted. Sometimes the rule is stated to be that the transfer of title is effected by the delivery made by the depositary after the death of the grantor, but such

delivery takes effect by relation as of the date when the deed was placed in the depository's hands. The result is the same on either theory. *Schurz v. Schurz*, 153 Iowa 187, 191; *Münch v. Münch*, 148 Iowa 18, 19; *Criswell v. Criswell*, 138 Iowa 607, 611; *Lippold v. Lippold*, 112 Iowa 134; *White v. Watts*, 118 Iowa 549; *Foreman v. Archer*, 130 Iowa 49; *Stewart v. Wills*, 137 Iowa 16; *Newton v. Bealer*, 41 Iowa 334; *Dunlap v. Dunlap*, 94 Mich. 11.

It is also true that an acceptance of the deed by the grantee is necessary to complete a transfer of title to land. But ordinarily, the acceptance of a conveyance of valuable property is presumed. It is not even essential to

2. DEEDS: acceptance: presumption in case of valuable property.

the delivery of a deed deposited with a third person to be delivered after the grantor's death that the grantee have any knowledge of the transaction until the grantor dies. In such case, if, when he is made aware of the deed deposited for him, he accepts it and claims the benefits of its provisions, such acceptance goes back to the date of delivery to the depository. If such deed attaches any burden to the title or property so transferred, the acceptance of the conveyance implies the grantee's consent thereto, and such assent, like his acceptance of the title, goes back to the same date. *Everett v. Everett*, 48 N. Y. 218; *Robbins v. Rascoe*, 120 N. C. 79; *Jones v. Swayze*, 42 N. J. L. 279; *National Bank v. Bonnell*, 61 N. Y. Supp. 521; *Ensforth v. King*, 50 Mo. 477; *Wuester v. Folin*, 60 Kan. 334; *Hathaway v. Payne*, 34 N. Y. 92; *Smiley v. Smiley*, 114 Ind. 258; *Stewart v. Stewart*, 5 Conn. *320; *Elsberry v. Boykin*, 65 Ala. 336; *Bury v. Young*, 98 Cal. 446; *Crooks v. Crooks*, 34 O. St. 610; *Commonwealth v. Selden*, 5 Munf. (Va.), 160; *Haeg v. Haeg*, 53 Minn. 33; *Emmons v. Harding*, 162 Ind. 154. And, while the rules of these cases apply with less conclusiveness where acceptance involves acquiescence in burdensome obligations (see *Church v. Gilman*, 15 Wend. [N. Y.] 656), yet this court has expressly held that, where a deed of that character has been deposited by the grantor with a third

person for delivery after his death, and the grantee, after being made aware thereof, signifies his acceptance, it goes back to the date of the delivery of the deed into the hands of the depository. *In re Estate of Podhajsky*, 137 Iowa 742, 745.

Let us, then, turn to the facts developed by the record in the case at bar. It appears that, from the death of the father of the parties, the son Edward, during most of the time, lived in the family home, and, for a period preceding the making of the will and deed, had been a lessee of the premises from his mother. He

3. WITNESSES:
competency:
transaction
with deceased.

had a family of his own, and occupied the same house with his mother, who, after the manner of mothers generally, continued to busy herself in assisting in the care of the household and of her grandchildren. The rest of her children were married and were maintaining independent homes of their own. According to the witness Martin, cashier of the Savings Bank, he was well acquainted with both grantor and grantee in the deed. They were both customers of the bank. On November 11, 1912, both parties came to the bank, and at the request of the mother he drew the deed, which was then and there executed and acknowledged by her, whereupon she asked him to keep the instrument and "give it to Ed when she died." The deed having been made, the witness then proceeded, at Mrs. Kyle's request, to draw her will, and she executed it. Both papers were held by him until the death of Mrs. Kyle, when he delivered the deed to Edward, and at his request had it recorded. There is neither plea nor proof that the mother was then of unsound mind, or that the deed was procured by undue influence. Several witnesses testify that she spoke of her purpose to make such conveyance, and that, before going to the bank on the day mentioned, she stated it to be for the purpose of making the deed, and after her return home, announced that she had made a deed to Edward and left it at the bank for him. Members of the family who are competent witnesses testify also to hearing conversation between Edward and his mother, in which she told him that

she would deed the land to him, but would expect him to keep her during life, and that he responded with a promise so to do. At Martin's office, she stated to him the provisions she desired to have incorporated in the deed. Edward was present, and made no objection to the form or contents of the instrument. There is not a word of direct evidence to dispute this showing. Appellants seek to avoid its effect, first, by denying the competency of Martin to testify in the case because he was interested in the event of the suit. This objection is worked out as follows: It was drawn out on cross-examination that defendant was, at the beginning of the trial, indebted to the bank in the sum of \$110.56, and that Martin was a stockholder and cashier in the bank; wherefore it is said that he is rendered incompetent to testify, under the provisions of Code Section 4604. The record is devoid of any evidence showing any disqualifying interest in the witness. The defendant did not owe him a dollar; and, even if he did, the mere fact that an offered witness is a creditor of a party to the suit is not made a disqualification by the statute, nor can we conceive it possible that any court has ever so held. Certainly counsel fail to cite any precedent of that kind. Again, the bank, which is the alleged creditor, and its stockholder or employee, are two different individuals, and the interest of the one is not, in the statutory sense of the word, the interest of the other. There is not even a suggestion that the bank itself has any lien or claim upon the property or upon defendant's interest therein, or that defendant was not perfectly solvent and able to pay all his obligations. Indeed, it was shown without dispute that, before the trial was over, the debt to the bank was fully paid and discharged. The exception to the ruling of the trial court is without merit. The interest which will disqualify a witness under the statute is direct and present. An interest which can be affected by the result of the suit only in some remote or merely possible contingency will not disqualify. *Bird v. Jacobus*, 113 Iowa 194; *Clinton Savings Bank v. Underhill*, 115 Iowa 292; *Molli-*

son v. Rittgers, 140 Iowa 365; *German Am. Sav. Bank v. Hanna*, 124 Iowa 374.

Counsel further say that not only did the defendant fail to accept the deed in the grantor's lifetime, but he expressly and positively refused to accept it. We think that there is no evidence of any refusal to accept the deed.

4. **DEEDS: acceptance: evidence.** Martin, the one competent witness to the transaction, makes no such statement, nor does he testify to any fact from which such a conclusion can be drawn. On the contrary, he says that the parties came to his office together, defendant was there and heard his mother give directions for drawing the deed and the conditions to be inserted therein, and, while the witness does not remember that defendant verbally expressed his consent, he did not express any dissent, and the witness has no recollection that the deed was offered to him after its execution, but is certain that the mother requested that the instrument be kept by the bank and delivered to Edward after her death. The only evidence on which it is claimed that defendant refused the deed is found in a showing that, in the hearing in the probate proceedings upon a claim filed against the estate by the defendant, he was a witness, and in his cross-examination did say, in an answer to a question by counsel, that, on the day that the deed was drawn, his mother proposed to have it recorded at once, but he objected to it and did not accept the deed; but a transcript of his evidence as taken by the reporter shows that, when read as a whole, it is consistent with his present claim. Stated in his own language, he said:

"She wanted it recorded then and there and I said not to have it recorded because it was laying her under obligations to me and I would not have it. I would not accept anything to leave mother under obligation to me. I would accept nothing. I didn't accept the deed. It could be left there and be mine after her death."

Testifying in this case, defendant says that his mother, on a former occasion, executed another deed to him for the same property, which he did not accept, and it was that occasion which he had in mind when testifying in the probate proceedings. This explanation is not quite consistent with other parts of his testimony, though there is other evidence tending to show that deceased did make another deed to him for the same property, prior to the date of the conveyance in controversy, but, for some reason not otherwise explained, it was not delivered. But, assuming that his testimony in both hearings had reference to this particular deed, it is sufficiently clear that his objection, if any, was to the present recording of the deed, and that he consented that it should be deposited with the bank to be delivered after the grantor's death.

The further point made, that the acceptance of the deed which imposed upon defendant the duty of supporting his mother and assuming the mortgage indebtedness will not be presumed, is clearly controlled by the rule of the *Podhajsky* case, *supra*, even if we assume that defendant did not accept the deed until after his mother's death. We think, however, that the record sufficiently shows his acceptance on the day that the deed was made and deposited in the bank. As we have already said, defendant came with his mother to the notary for the express purpose of having the deed made; it was dictated by her and prepared by the notary in his presence; there is nowhere any testimony that he objected to any provision therein; and the only objection, if any, made by him was to the present recording of the instrument, preferring that it be left with the bank until after his mother's death. This alone would be a consent on his part to receive the title *cum onere*, and bind him to a performance of the obligations expressed in the deed.

II. Reliance is expressed by the appellants upon the proposition that the bank was the agent of the grantor, and

5. *DEEDS*: acceptance: acceptance after death of grantor: effect.

that a deposit of the deed in the hands of her own agent would not operate as a delivery of the instrument to the grantee; and, further, that the death of the grantor while the deed was yet in the agent's hands worked a revocation of the agency, and a subsequent delivery to the

6. *Dumps*: delivery to third party; agency created.

grantee was ineffectual. It seems hardly necessary to say that the universal holdings of all the courts are that the deposit of a deed with a third person to be delivered to the grantee upon the death of the grantor has effect to make the depository the agent or trustee of the grantee, and the delivery to such agent or trustee is effectual to vest the grantee with a present interest from the date when the instrument is so deposited by the grantor. Of course, the deposit of the deed by the grantor in the hands of his own agent for safe-keeping, or to be held for the grantor, or such deposit made without instructions, would not be a delivery to the grantee; but, when the grantor deposits the deed with a third person, directing him to deliver it upon the happening of the grantor's death, no authority or control over the instrument being reserved, the possession of the custodian is for the use of the grantee alone, and, even if the grantor should repent the act and in some way repossess himself of the instrument or destroy it, the grantee's title is not thereby divested. *Matheson v. Matheson*, 139 Iowa 511, 514; *In re Bell's Estate*, 150 Iowa 725; *White v. Watts*, 118 Iowa 549.

It is next argued that a posthumous delivery is effectual only where all the conditions of the deed have been complied with. Admitting, for the purposes of the case, the correctness of the abstract proposition, we find nothing in this record to call for its application. True, some of the members of the family hostile to the defendant testify to the general conclusion that Edward and his family were living with his mother, instead of her being supported by him. This statement they justify from the fact that the place had been the mother's home for many years, that she continued to live there until

her death, and that some of them at times saw her pay for articles for the family use. On the other hand, it appears without dispute that Edward leased the premises; that bills for the needs of the family, including those of the mother, were charged to his account and paid by him. That the mother, who evidently had means of her own, should at times make purchases for herself or for the family was not at all unnatural, and has little, if any, tendency to discredit plaintiff's claim that he did perform his duty in providing for her support. In this connection, it must be borne in mind that there is no condition expressed in the deed to be performed before the conveyance should take effect. The deed itself indicates an intention to convey a present interest (*Kneeland v. Cowperthwaite*, 138 Iowa 193), and the so-called "conditions" therein are merely statements of the consideration for the conveyance, or at most, conditions subsequent. If the grantor saw fit, as she evidently did, to accept the grantee's promise to assume the mortgage and to give her a life support as a sufficient consideration upon which to convey the title to him, it was within her right and her power so to do. Had the deed been conditioned to take effect only when the agreed consideration had been furnished or performed, a very different problem would arise.

III. Counsel concede that the law of this state recognizes the effectiveness of a conveyance deposited with a custodian for delivery after the grantor's death, but say that the rule has no application where the grantor retains control over the deed or power to withdraw it from the deposit or change its terms. Conceding for the purposes of the argument the correctness of this qualification of the rule, yet there was here no such reservation of right or authority. No witness undertakes to say that the grantor made any such reservation or expressed any such desire or intention. Her simple and unequivocal instruction to the bank was to keep it and deliver it to the grantee upon her death. In that act, accompanied by such instruction, she divested herself of the title to the

property as completely as would have been the case had she then placed the deed in the defendant's hands, and he had at once put it of record.

Of the other exceptions enumerated by counsel to the admitted general rule, it is sufficient here to say that they are based upon assumptions of fact which we have already found are not established by the evidence.

IV. The foregoing conclusions reached upon the merits of the case render it unnecessary for us to pass upon the estoppel pleaded by the defendant. It is proper to add, we think, that to hold with appellants in this controversy would be to wholly defeat the clear intent which this mother had in the distribution of her estate. So far as appears in the record, her relations with all her children were affectionate and harmonious. Taking the deed and the will together, she made them all recipients of her bounty. She did not measure out her estate in equal shares, but we know nothing of what she had already done for her individual sons and daughters. She, of all persons, knew best the extent of her obligations to each and the merits of each. We may fairly assume that, in view of all these circumstances, her distribution of her estate was equitable, if not equal, and that, in giving this farm to Edward and the larger share of the rest of her estate to Andrew and William, she gave to each all he was entitled to ask or expect. For the court to now say that appellants, holding in firm grip the large share of their mother's estate under the residuary clause of her will, shall be permitted to defeat the deed to plaintiff, and by virtue of that same devise, which it is clear that she never would have made had she not believed she had by this conveyance provided for Edward, would be a most inequitable result. True, where such result is the necessary and inevitable consequence of adherence to established rules of law and rules of property, the court has no discretion except to declare the law as it is, regardless of its effect upon the litigants; but law has been framed and courts organized to prevent, rather than to promote, miscarriages of justice, and

it is only in very exceptional cases that they wholly fail in their mission.

It is to be admitted that defendant does not wholly purge himself of the taint of selfishness manifest in some of his actions in the premises, but in this respect neither are the plaintiffs in position to become his critics. We commend them all to the careful and prayerful study of Genesis xiii, 8, and the 133d Psalm.

The decree appealed from is right, and it is therefore—
Affirmed.

EVANS, C. J., DEEMER and PRESTON, JJ., concur.

THOMAS W. LAW, Appellee, v. BRYANT ASPHALTIC PAVING CO.,
Appellant.

NEGLIGENCE: Acts or Omissions Constituting—Public Improve-

- 1 **ments—Obstructing Public Streets—Barriers—Warnings.** The maintenance, in a public street, by a contractor engaged in laying paving in said street under authority of the city, of a concrete mixer so placed as to impede travel by pedestrians on the sidewalk, is not, of itself, a negligent act on the part of the contractor, but may become such by failure to exercise reasonable care (a) to erect a barrier to turn pedestrians from the path of danger, (b) to give pedestrians warning of the danger, or (c) to discover the danger to a pedestrian and to prevent his injury. Evidence reviewed, and held to present a jury question as to defendant's negligence.

NEGLIGENCE: Contributory Negligence—Obstruction in Highway.

- 2 Record reviewed, and held to present a jury question whether plaintiff, in passing a concrete mixer located in a public street and obstructing travel by pedestrians, was guilty of contributory negligence.

TRIAL: Instructions—Form, Requisites and Sufficiency—General

- 3 **Test—Negligence.** Not what a minute, technical or hypercritical analysis of an instruction might show is its possible meaning, but what idea is the language fairly calculated to convey to the minds of jurors drawn from the ordinary walks of life. Instructions reviewed, and held to correctly cover, with reasonable fullness, the relative rights and duties of a public contractor in handling his

machinery in a public street, and of a pedestrian walking along such street.

Appeal from Webster District Court.—R. M. WRIGHT, Judge.

MONDAY, APRIL 10, 1916.

ACTION at law to recover damages on account of personal injury. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

Kenyon, Kelleher & O'Connor, for appellant.

Price & Joyce, for appellee.

WEAVER, J.—The defendant, as contractor, was engaged in laying a pavement on one of the streets of Fort Dodge. As a part of its equipment in the performance of the work, it made use of a machine or device known as a concrete mixer, which was operated by steam power. The machine was provided with a boom, or lifting beam, on the outer end of which was fitted a hopper or "skip." When lowered to the ground, the skip was filled with materials for the mixture, then lifted to a position from which the contents were discharged into the mixing drum. The engineer operating the machine stood in a position where he could see the operation of the lift. The outfit was mounted on a truck, by which it was moved from place to place, as might be needed in the prosecution of the work. The paving had been in the course of construction for a considerable period before the accident hereinafter mentioned, but the mixing machine had recently been moved from another location and placed at the intersection of Second Avenue North, and Seventh Street. It was so placed that the lifting beam extended over and across the path or walk ordinarily used by pedestrians. When the lift was raised, the path, unless otherwise obstructed, was clear; when lowered, it was an obstruction to travel; and when in operation, was a source of danger to anyone passing under it. The street

was a main thoroughfare leading into the business section of the city, and many pedestrians made use of it. The plaintiff, who was employed in a grocery in the business section of the city, used the street in question in passing between his home and place of employment, and had seen the mixing machine at other locations, but claims not to have been familiar with its method of operation. There is some conflict in the evidence as to how long the machine had been in this particular location before the accident, but the jury could properly have found that it had stood there some three or four days, but had not been in operation until the day when plaintiff was hurt. The jury could also have found that, while the machine was thus standing idle, no barricade was provided to divert the travel of pedestrians from the usual path at this point, and that in fact many people continued to pass back and forth, without any apparent effort by defendant to interfere with such passage until after the accident. The plaintiff, going to his work in the morning and returning to his home at noon of that day, used the path by the machine, and saw no indication of its operation. During his noon hour, and before his return to work, it appears that the machine was set in motion. As he approached the place, a severe snowstorm had set in. He saw several men gathered in that vicinity, who did not appear to him to be engaged in work, and he drew the inference that work had been suspended on account of the storm. He saw nothing and heard nothing which suggested to him that the machine was in operation; there was no barrier on or across the walk; and he had no warning of any kind that the passage was dangerous, and proceeding, as he and others had done before, he was struck by the descending skip and severely injured. This statement is, of course, in many respects denied by the defendant and its witnesses; but there is evidence upon which, as we have already said, the jury could find it substantially true.

The charge of negligence made against the defendant is, in effect, that it failed to exercise due care to erect a barrier

to turn pedestrians from the path of danger, or to give warning of such danger, or to discover the plaintiff's danger in time to prevent his injury by the falling skip.

I. The question first in order is whether there is any evidence for the jury upon the charge of negligence made against the defendant. Upon this, there is little room for argument.

The defendant undoubtedly had the right, and the jury were so informed, to occupy the streets with its machine, and the mere fact that it thereby obstructed the travel did not render the defendant a wrongdoer or make it liable in damages for the inconvenience thereby occasioned to the public or to individuals. It was bound, however, to exercise that right with reasonable care to avoid injury to persons attempting to make such use of the street as was practicable; and, if the machine was so located as to make passage along the walk unsafe, it was open to the jury to find that reasonable care required the erection of suitable barriers to call the attention of travelers to the danger and divert them therefrom, or, in the absence of barriers, to keep a watchman on guard to turn people away while the machine was in operation. From what we have already said of the facts of which there was evidence, it is very clear that the question of defendant's negligence was not one upon which the court was authorized to pass as a matter of law, and there was no error in submitting it to the jury.

II. Was the plaintiff chargeable with contributory negligence as a matter of law? The affirmative of this question is vigorously argued for the defendant. Some of the proved or

1. NEGLIGENCE:
acts or omissions constituting: public improvements: obstructing public streets: barriers: warnings.
2. NEGLIGENCE:
contributory negligence: obstruction in highway.

admitted facts have a legitimate tendency to sustain the conclusion that plaintiff did not manifest reasonable care for his own safety; but, on the other hand, the record is not without a showing of facts from which his exercise of reasonable care may be inferred. The machine had stood at this location idle for several days, and its presence during that time

created no danger to persons using the path. The path had been left open and unobstructed, an invitation to its continued use. Plaintiff and others frequently passed that way without being advised or warned by the defendant of any danger. He had in fact used the path without objection or warning but an hour before his injury. When he came back, the machine had been in operation less than half an hour; he was facing a severe storm; and, his progress being uninterrupted by any barrier or warning, the court can hardly assume to say, as a matter of law, that the average man of ordinary intelligence and prudence would have done otherwise than he did under the circumstances. The case is not comparable, we think, with the railway cases cited by the appellant. It is only where there is no room for fair and reasonable minds to differ upon the conclusion to be reached that the court may direct a verdict, and the case before us is not of that conclusive character.

III. Error is assigned upon the instructions given the jury as follows. The court in summarizing the issues, said to the jury:

2. TRIAL: instructions: form, requisites and sufficiency: general test: negligence.

“The acts which the plaintiff says constitute the negligence on which he claims and upon which he predicates his right to recovery are that: (1) The defendant was negligent in that it failed to erect an ample and sufficient barrier at said place in order that pedestrians might be turned from the path usually trod by them; (2) the defendant was negligent in that it failed by any device or method to warn the public generally and this plaintiff in particular of the danger incident to the operation of the said machine at said place; (3) the defendant was negligent in that it failed to erect and maintain a guard around the said place where the said machine was being operated sufficient to prevent the public in general or this plaintiff in particular from going into a place where he would be injured by the operation of the said machine; (4) the defendant was negligent in

failing to warn the plaintiff of its purpose to lower the said lift or elevator as the plaintiff was passing in close proximity thereto.”

This is said by counsel for appellant to be equivalent to instructing the jury that defendant was bound to put up a barrier which was impassible. It is further objected that the statements in the second, third and fourth subdivisions of the paragraph are capable of being understood by the jury as charging the defendant with the duty not only to erect a suitable barrier, but also to warn the public generally and the plaintiff in particular of the danger there existing; as well as to give him notice when the elevator was to be lowered, and that such duties were incumbent upon defendant even though plaintiff knew, or as a reasonable man ought to have known, of the danger to be encountered in using the path.

These criticisms, we think, are not justified. The statement of the acts and omissions which plaintiff charges as negligence are quoted literally by the court from the plaintiff's petition. In so doing, we think that the court rightfully allowed the plaintiff to state in his own language the very grounds upon which he seeks to recover. The fact that, with the linguistic exuberance of the profession, counsel for plaintiff state and restate their alleged cause of action in varied forms, cannot serve to prejudice the defense, where the court clearly states the pertinent rules of law and directs the attention of the jury to the essential issues, in which respect the defendant here has no just ground of complaint. The jury was told that defendant was rightfully in the street, that it was bound to no more than ordinary care in the conduct of its work therein. An “ample and sufficient barrier” could not mean more to any ordinarily intelligent juror than a barrier reasonably sufficient to indicate to the mind of the traveler passing that way that the path was closed to public use. Nor is there anything in the other specifications of negligence or in the instructions with reference thereto to suggest to the

jury that, if defendant had performed its full duty with reference to a barrier, it could still be held negligent in not giving, in addition thereto, a public or an individual warning of the danger. It is probably true that no instruction or charge to a jury has ever been drawn with such perfect clearness and precision that an ingenious lawyer, in the seclusion and quiet of his office, with a dictionary at his elbow, cannot extract therefrom some legal heresy of more or less startling character. The real test of the meaning and effect of an instruction for the purpose of review by an appellate court ought to be, and we think is, the idea which the language objected to is fairly calculated to convey to the minds of jurors drawn from the ordinary walks of life; and the fact that, upon a minute, technical or hypercritical analysis, some other interpretation can be placed thereon, may be disregarded. The charge in this case, taken as a whole, recognizes the right of the defendant, as well as of the plaintiff, in the street; the duty of each to use reasonable care to avoid injury to or interference with the other; the burden upon plaintiff to establish his allegation of negligence by defendant; and his own freedom from contributory negligence. All these matters bearing upon the relative rights and duties of the parties were treated with reasonable fullness.

The record impresses us with the thought that the case was fairly tried, and that there is no substantial reason for interfering with the result below. The judgment appealed from is therefore—*Affirmed*.

EVANS, C. J., DEEMER and PRESTON, JJ., concur.

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provided in that part of the Workmen's Compensation Act which provides: (a) for filing with the commissioner memorandums of agreements as to compensation; (b) for the approval or disapproval of the same by the commissioner; (c) for the formation of an arbitration board where no agreement as to compensation is reached; (d) for hearings and findings by the said board; (e) for the modification of such findings by the commissioner; (f) for a limited appeal to the courts; and (g) for an entry of a decree by the court on said final findings. (Secs. 2477-m24 to 2477-m34, Code Supp., 1913.) *Hunter v. Colfax Cons. Coal Co.*, 245.

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 9 The Workmen's Compensation Act leaves both employer and employee the liberty to accept or reject its provisions, and the requirements of the act, in case of acceptance, constitute a proper exercise by the legislature of the general power of "community self-defense,"—the police power,—a power which embraces even the right to abridge, for purposes properly within its scope, the right of contract. *Hunter v. Colfax Cons. Coal Co.*, 245.

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Right to contract: Invalidating contracts: Workmen's Compensation Act. The constitutional "right to contract" is limited by the legislative right to invalidate all contracts, rules, regulations or devices:

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- (b) Which stimulate a disregard of human safety, or
- (c) Which encourage breaches of contract or statutory obligations entered into, or
- (d) Which, generally, interfere with declared public policy.

Held, the following provisions of the Workmen's Compensation Act do not work an unconstitutional interference with the right to contract:

- (a) Prohibiting, generally, any device by which the employer might escape the obligations imposed;
- (b) Prohibiting the withholding of wages;
- (c) Prohibiting the exaction of contributions or insurance premiums;
- (d) Prohibiting the waiver of rights by employees;
- (e) Prohibiting efforts by an employer to induce employees to reject the act; and
- (f) Prohibiting, in effect, contracts of settlement within 12 days of an injury. (Secs. 2477-m2,-m7,-m12,-m17,-m18, Code Supp., 1913.) *Hunter v. Colfax Cons. Coal Co.*, 245.

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- 11 **WHETHER** the statutory declaration that, as to corporations organized under the general incorporation laws of this state, "The articles of incorporation, by-laws, rules and regulations . . . shall, at all times be subject to legislative control and may be, at any time, altered, abridged or set aside by law, and every franchise obtained, used or enjoyed . . . may be regulated, withheld or be subject to conditions imposed upon the enjoyment thereof, whenever the General Assembly shall deem necessary" (§ 1090, Code, 1873; § 1619, Code, 1897), and **WHETHER** the constitutional power of the General Assembly "to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities . . . and no exclusive privileges, except as in this article provided, shall ever be granted" (§ 12, Art. 8, Const.), **CONSTITUTES A RESERVATION OF POWER SO BROAD AND COMPREHENSIVE AS TO CONSTITUTIONALLY JUSTIFY** the legislature not only in taking away at pleasure the corporate fran-

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15 fication—a declaration that certain employees are and certain others are not within the provisions of the act—cannot be held to be arbitrary when those included may voluntarily exclude themselves, and those excluded may, in effect, voluntarily include themselves. So *held* under the Workmen's Compensation Act. *Hunter v. Colfax Cons. Coal Co.*, 245.

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 16 and rejection. The difference in consequences attaching, respectively, to rejection and acceptance of the provisions of the Workmen's Compensation Act by employer and employee is not so manifestly and palpably arbitrary and such misuse of the conceded power of the legislature to classify as to justify a holding that the said act is unconstitutional by reason thereof, some fair differences being allowable under the police power, in order to equalize the inequality of positions held by employer and employee. *Hunter v. Colfax Cons. Coal Co.*, 245.

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 2 edge of the nature of the wound inflicted may testify that such
 wound was, in his opinion, inflicted by a certain instrument,—
 for instance, some dull instrument. *State v. Brackey*, 599.

Usurping function of jury. A question which calls for an answer
 3 on the ultimate question which the jury must determine, is
 properly excluded. So *held* where the defendant, charged with
 assault with intent to inflict great bodily injury, was not
 permitted to testify "whether he used any more force on the
 prosecuting witness than was necessary to protect himself."
State v. Brackey, 599.

TRIAL—VERDICT.

Joint defendants: Form of verdict. It is reversible error to sub-
 4 mit, in a joint trial of joint defendants, forms of verdicts

CRIMINAL LAW Continued **TO** **DAMAGES**
 which require a joint conviction or a joint acquittal, the
 evidence against the defendants being materially different on
 the question of guilt. (Sections 3730, 5384, Code, 1897.)
 State v. Miller, 210.

CUSTOM. See **CONTRACTS**, 3; **EVIDENCE**, 17.

DAMAGES. See **DEATH**, 1; **FRAUD**, 4; **RAILROADS**, 3.

DIRECT DAMAGES.

Measure of damages: Breach of contract: Proximate results.

- 1 Recovery may always be had for that loss which is the direct result of the breach of a contract. *Foley v. Nimocks*, 464.

SPECULATIVE DAMAGES.

Proximate cause: Libel and slander. Evidence as to certain board-

- 2 ers' having left plaintiff's restaurant by reason of the alleged libel in question held purely speculative. *Gundram v. Daily News Pub. Co.*, 60.

Profits: Keeping boarding house. In an action for personal injuries

- 3 resulting in an alleged loss of time, services, and inability to perform labor or earn money, the possible profits of keeping a boarding house are not an element of recovery. *Worez v. Des Moines City R. Co.*, 1.

MEASURE OF DAMAGES.

Pain and suffering: Future pain: Permanency of injuries: In-

- 4 structions. An instruction allowing a recovery for future pain only in case the injuries from which the pain comes are permanent, is erroneous. *Worez v. Des Moines City R. Co.*, 1.

EVIDENCE.

Personal injuries: Expenditures. There can be no recovery in an

- 5 action for personal injuries, for expense incurred for physicians, nurse or other expenditures, in the absence of evidence showing the reasonable necessity therefor and the reasonable value thereof. *Worez v. Des Moines City R. Co.*, 1.

DEATH

TO

DEEDS

DEATH.**DAMAGES.**

Evidence: Occupation of parent of deceased child. The nature and emoluments of the occupation of the father of a deceased child become material and competent in an action for the wrongful death of the child, especially when the child's substantial participation in the father's business is shown. *Johnston v. Delano*, 498.

DEEDS.**DELIVERY.**

Acts constituting delivery. Anything which signifies the intention
1 of the grantor of a deed to part with his dominion over the paper, so that it may become a muniment of title in the grantee, operates as a legal delivery. *Wagle v. Iowa State Bank*, 92.

Delivery to third person after grantee's death. Depositing a duly
2 executed deed with a third person, with directions to deliver the same to grantee upon the death of grantor effects a complete delivery to grantee with enjoyment postponed. *Kyle v. Kyle*, 734.

Delivery to third party: Agency created. The act of the grantor
3 in a deed in depositing the same with a third person, with no reservation of power in grantor to recall the deed, and with directions to deliver the same to grantee after grantor's death, has the effect of constituting such third party the agent of the grantee in the holding of said deed. *Kyle v. Kyle*, 734.

ACCEPTANCE.

Presumption in case of valuable property. The acceptance of a
4 deed to valuable property is, ordinarily, presumed. So held where a son, grantee in a deed executed by the mother, and delivered to a third party with directions to deliver to grantee after her death, was present when the deed was executed and made no objections thereto. *Kyle v. Kyle*, 734.

Acceptance after death of grantor: Effect. The acceptance of a
5 deed, with all the burdens carried thereby, made after the death of grantor (grantor having delivered the deed, when

DEMS Continued

TO

Drains

executed, to a third party, with directions to deliver to grantee after grantor's death) goes back to the time that said deed was left with said third party. *Kyle v. Kyle*, 734.

Evidence. Evidence reviewed, and *held* insufficient to show that grantee in a deed did not accept the same. *Kyle v. Kyle*, 734.

RECORDING.

Alterations subsequent to delivery: Failure to redeliver and re-
7 **acknowledge:** Constructive notice. Material alterations in an
instrument affecting real estate, made *subsequent* to its com-
plete execution, acknowledgment and delivery, and with the
consent of the grantor, have the effect of creating an entirely
new instrument and, in order that the recording of such
altered instrument may carry constructive notice of its con-
tents, it is necessary that there be a *redelivery*, a *reacknowl-*
edgment and a *rerecording*. *Wagle v. Iowa State Bank*, 92.

ACTION TO SET ASIDE.

Inadequacy of consideration. Inadequacy of consideration is not, of itself, ground for setting aside a deed. *Johnson v. Tyler*, 723.

Fraud: Degree of evidence necessary. To impeach a solemnly executed deed to real estate on the ground of fraud, the testimony must be clear, satisfactory and convincing, and something more than a bare preponderance in the balancing of probabilities. Evidence reviewed, and *held* insufficient to justify the order of the lower court annulling a deed. *Johnson v. Tyler*, 723.

DESIGNATIO UNIUS EXCLUSIO ALTERIUS. See PLEADING, 10.

DRAINS.

ASSESSMENT OF BENEFITS.

Assessment exceeding benefits. An assessment of benefits for a drainage improvement is not necessarily invalid because in excess of benefits. *Chicago, R. I. & P. R. Co. v. Drainage Dist.*, 417.

Railway right of way: Equitableness of assessment: Acreage
2 basis: Market value. An assessment of benefits on a railway
 right of way for a drainage improvement will not be condemned

DRAINS Continued

TO

ELECTION OF REMEDIES

as inequitable because, *on an acreage basis*, it is materially greater than on farm lands in the district. The very nature of the right of way forbids such comparison. Neither will such assessment be condemned because it can be shown that no immediate increase in market value of the right of way took place. *Chicago, R. I. & P. R. Co. v. Drainage Dist.*, 417.

Appeal: Question at issue. The limit of the right of the land-
 3 owner, on appeal from an assessment of benefits for a drainage improvement, is to show that the assessment is not an "equitable apportionment." He may not show that his lands *have not been benefited at all*. The question whether his lands would receive *some* benefit was fully adjudicated at a former stage of the proceeding, to wit, when the district was established and the lands were included therein. (Sec. 1989-a12, Code Supp., 1913.) It necessarily follows that the court cannot *wholly set aside* such assessment. It may *reduce*, but only on a clear showing of inequitableness. *Chicago, R. I. & P. R. Co. v. Drainage Dist.*, 417.

Appeal: Presumption. An assessment of benefits for a drainage
 4 improvement, regularly made by the officers upon whom that duty is laid by statute, and approved by the lower court on appeal, is clothed with a presumption of correctness so strong that the burden of proof is on appellant in the Supreme Court to make some affirmative showing of substantial grounds of invalidity. *Chicago, R. I. & P. R. Co. v. Drainage Dist.*, 417.

DUE PROCESS. See CONSTITUTIONAL LAW, 17-19.

EASEMENTS.**ADVERSE POSSESSION.**

Use: Claim of right. Use alone will not establish an easement in real estate. There must be a *claim of right*, independent of use, and with knowledge of such claim on the part of the one against whom the easement is sought to be enforced. (Section 3004, Code, 1897.) *Lehfeldt v. Bachmann*, 202.

ELECTIONS. See CONSTITUTIONAL LAW, 4; OFFICERS.

ELECTION OF REMEDIES.**ACTS CONSTITUTING.**

Vendor and purchaser: Rescission of contract. A vendee in a contract of sale of real estate who, in an action of specific

ELECTION OF REMEDIES Continued to

ESTOPPEL.

performance brought by the vendor, asks for and receives a *cancellation* of the contract and judgment for payments and improvements made, thereby makes an irrevocable election of remedies, and may not, subsequently, maintain an action to recover damages for loss of his bargain. *White v. Harvey*, 213.

EMINENT DOMAIN.

CONDEMNATION.

Sheriff's jury: Qualifications: Bias and prejudice. Bias and prejudice on the subject of the owner's damages do not disqualify a sheriff's jury appointed to assess damages by reason of the taking of private property for public use (in the present case, for cemetery purposes), provided the jurors (a) are freeholders of the county (or city), and (b) are not interested in the same or a like question. Appeal affords adequate remedy for the correction of any resulting wrong. So held where the jurors, owing to defective proceedings, had, in the same proceeding, thrice served as such jurors. (Sections 884, 1999, 2000, Code, 1897; 2009, Code Supp., 1913.) *Price v. Town of Earlham*, 576.

EQUAL PROTECTION OF LAWS. See CONSTITUTIONAL LAW, 14-16.

ESTOPPEL. See APPEAL AND ERROR, 18, 19; INSURANCE, 4; JUDGMENT, 2.

EQUITABLE ESTOPPEL.

Failure to act on conduct: Vendor and purchaser. An estoppel
1 *in pais* arises only when conduct of one party has been acted on by another to the prejudice of such other. So held where the owner of land, in refusing to convey the same in accordance with an alleged contract with his agent, assigned as cause *that his wife was unwilling to sell*, and, before the alleged purchaser had in any manner acted on such reason to his prejudice, further wrote, and assigned as reason for his refusal *that the alleged contract with the agent was wholly unauthorized*. *Dodd v. Groos*, 47.

Wife's property in husband's name: Credit extended to husband.
2 A wife who permits her husband to take conveyance of her property in his own name—who thereby permits and invites

ESTOPPEL Continued

TO

EVIDENCE

the world to look upon and treat him as the owner, and thereby enables him to secure a false credit—is estopped to assert her ownership against the one deceived. *Willey v. Hite*, 657.

EVIDENCE. See ACCOUNT, ACTION ON, 1, 2; CRIMINAL LAW; DEATH, 1; DEEDS, 9; PROSTITUTION, HOUSE OF; TRIAL; WILLS, 2-6; WITNESSES, 5.

JUDICIAL NOTICE.

Terms of court: Final adjournment. This court will not take
1 judicial notice of the time of the final adjournment of a term of the district court. *White v. Harvey*, 213.

PRESUMPTIONS.

Continuance of condition: Insanity. A condition once shown to
2 exist is presumed to continue until the contrary is made to appear by him who asserts such contrary condition. So held in case of insanity. *Weber v. Railway Co.*, 358.

RELEVANCY, MATERIALITY AND COMPETENCY.

Personal injury: Former sickness and injury. Under the claim
3 that a present physical condition is due solely to a certain accident, any evidence which challenges such claim is relevant, competent and material—for instance, evidence of former sickness or injury or attempts to recover therefor. *Worez v. Des Moines City R. Co.*, 1.

Attendant incidents. When a fact is relevant, competent and
4 material, then the further incidents which lead up to, explain and are a part of such fact are admissible. *Worez v. Des Moines City R. Co.*, 1.

Personal injury: Expert testimony. Testimony as to the ailment
5 from which a plaintiff was suffering at a time prior to the accident for which recovery is sought may be competently given by a physician who examined her at such prior time, and such testimony may be relevant and material on the issue whether her present condition is due solely to the accident in question. *Worez v. Des Moines City R. Co.*, 1.

Logical connection. Evidence, to be relevant, must have some
6 logical connection with or relation to a fact in issue, so as to assist in getting at the truth of it. *Worez v. Des Moines City R. Co.*, 1.

EVIDENCE Continued

RES GESTAE.

Expressions of pain. Complaints of pain immediately following an
7 injury are competent. *Ewing v. Hatcher*, 443.

Motives and intention. All declarations, acts and exclamations ut-
8 tered by the parties to a transaction, which are contemporaneous with and accompany it, and are calculated to throw light upon the motives and intentions of the parties to it, are admissible as part of the *res gestae*. So held as to what defendant *said* and *did* at the time of an alleged assault on plaintiff. *Ewing v. Hatcher*, 443.

Instinctiveness: Coincidence in time. On the question whether
9 certain matter is *res gestae*, the all-important requisite is *instinctiveness*, not necessarily precise coincidence in point of time. *Peterson v. Phillips Coal Co.*, 223.

BEST AND SECONDARY.

Evidence beyond jurisdiction of court. Secondary evidence is ad-
10 missible of the contents of a writing when the original (assuming, *arguendo*, it to be such) is beyond the jurisdiction of the party offering it and not within his control. *Worez v. Des Moines City R. Co.*, 1.

Signed and unsigned memoranda. The rule that only the best evi-
11 dence of which a cause is susceptible is admissible is not violated by the reception in evidence of an unsigned memorandum, made by a disinterested witness in performance of his duty, and containing statements material to an issue on trial, even though it appears that there exists, or at one time did exist, in another state, a duplicate of said memorandum, signed by the party against whom the unsigned memorandum is offered. *Worez v. Des Moines City R. Co.*, 1.

ADMISSIONS.

Offer of compromise. Certain statements of defendant held not
12 to constitute an offer of compromise. *Ewing v. Hatcher*, 443.

HEARSAY.

Exception: Declaration against interest: Insanity of declarant:
13 **Law of necessity.** Declarations of a person as to facts relevant to the matter under consideration are admissible in evidence, even between third persons, where it appears:

EVIDENCE Continued

1. That the declarant is dead or *insane*.
 2. That the declaration was against his pecuniary or proprietary interests.
 3. That he had competent knowledge of the facts declared.
 4. That he had no probable motive to falsify the facts.
- Weber v. Railway Co., 358.

DOCUMENTARY EVIDENCE.

Expectancy of life: Standard life tables. Standard life tables are competent to show the expectancy of life. Grafton v. Delano, 483.

Books of original entry: Ledger pages: Workmen's slips.

- 15 a. "Ledger pages," being copies of workmen's slips, are not books of original entry and not admissible as such.
- b. "Workmen's slips," if shown to be the original entries of the transactions, and made in due course of business and at the times of the several transactions, are not rendered inadmissible, as books of original entry, because not bound in book form, especially when supplemented by statements of account sent to defendant and retained by him without objection. Emeny Auto Co. v. Neiderhauser, 219.

Memoranda: Conditions of admissibility. Memoranda made by a disinterested witness in the performance of his duty and known by him to have been correct when made, and containing statements of fact material to the issue on trial, are substantive evidence on said issue, along with the witness's oral testimony in relation thereto. So held in a personal injury action, wherein memoranda made by a medical examiner on plaintiff's application for insurance were received as bearing on plaintiff's state of health prior to the accident in question. Worez v. Des Moines City R. Co., 1.

PAROL AS AFFECTING WRITING.

Custom and usage: Pleading. Parol evidence is admissible without pleading to show that, by usage and custom, certain words and phrases employed in a written contract have a special meaning in the business with reference to which the contract is made. So held as to the clause, "complete piped well," in a contract for the construction of a well. Becker v. Inc. Town of Churdan, 159.

EVIDENCE Continued

Contradicting date of maturity of promissory note. The date of
18 maturity of a promissory note may not be contradicted by
evidence of an oral conversation prior to the signing of the
note. *Steele v. Ingraham*, 653.

"Parol evidence" rule: Non-applicability to one not signing. The
19 "parol evidence" rule is not applicable to one who does not
sign the writing in question. *Lanz v. Schumann*, 542.

OPINION EVIDENCE.

Functional action of body. Whether normal functional action of a
20 visible organ of the body, having functions peculiarly its own,
was interfered with in a specified way by a certain described
wound, is a statement of fact and not opinion by the one
suffering the injury. *Ewing v. Hatcher*, 443.

Intoxication. The fact of intoxication may be shown by one who
21 has observed the conduct and appearance of the person in
question and describes the same; however, as a seeming depart-
ure from the general rule, a preliminary detail of the appear-
ance and conduct of the person in question is not necessary.
Ewing v. Hatcher, 443.

"Appearance" of person. How a person "appeared"—for instance,
22 that his face appeared flushed, as though he was intoxicated—
is the statement of a fact. *Ewing v. Hatcher*, 443.

Opinions from observation: Ordinary witness: Law of necessity:
23 Marks of crowbar. The opinion of an ordinary witness drawn
from what he has observed is admissible when, from the nature
of the subject under investigation, no better evidence can be
obtained, or the facts cannot otherwise be fully presented to
the jury. *Weber v. Railway Co.*, 358.

Conclusions: Non-expert matters. Conclusion questions on non-
24 expert matters are not allowable—for instance, whether a
certain railroad crossing was a *public* or a *private* crossing.
Johnston v. Delano, 498.

Experts: Cross-examination. In the cross-examination of an ex-
25 pert, it is not necessary that the examiner confine himself to
the facts established in the case. He may assume almost any
state of facts for the purpose of testing the credibility of the
witness and the extent of his knowledge. *Ewing v. Hatcher*,
443.

EXECUTION
EXECUTION.

TO EXECUTORS AND ADMINISTRATORS

LEVY.

Indorsement of Levy on Writ. It is essential to a valid levy under
1 execution that the sheriff enter *the fact of levy* upon the writ
when such levy is made. The entry of such matters in the
encumbrance book, or on the writ of execution at the time of
making his final return after the sale, will not satisfy this
requirement. (Sec. 3965, Code, 1897.) *Mullaney v. Cutting*,
547.

SALE—MANNER, CONDUCT AND VALIDITY.

Sale without redemption: Essentials of notice. Notice of sale of
2 real estate on execution must distinctly state that such sale
will be made *without the right of redemption*, when such is
the fact. (Secs. 4023, 4024, Code, 1897.) *Mullaney v. Cutting*,
547.

Inadequate bid: Duty of sheriff to protect the debtor. A sheriff
3 selling real estate on execution, *no right to redeem existing*,
and receiving a bid known to be grossly inadequate, owes the
duty to the execution defendant to adjourn the sale. (Sec.
4029, Code, 1897.) *Mullaney v. Cutting*, 547.

Sale en masse without redemption: Inadequate bid. The fact
4 that an execution sale of real estate is made *en masse* and
on a grossly inadequate bid, *no right of redemption existing*,
furnishes a persuasive reason for exacting a more strict com-
pliance with the statutes governing such sales than is neces-
sary where the right to redeem exists. (Sec. 3970, Code, 1897.)
Mullaney v. Cutting, 547.

Sale without redemption: Strict compliance with statute. A sale
5 of real estate on execution, *without the right of redemption*,
demands an exceptionally strict compliance with the statutes.
Certain irregularities reviewed, and held, *when taken in their*
entirety, to invalidate the sale. *Mullaney v. Cutting*, 547.

EXECUTORS AND ADMINISTRATORS.

ALLOWANCE OF CLAIMS.

Services as member of family: Instructions: Assumption of facts.
In an action to recover against the estate of a decedent on

EXECUTORS AND ADMINISTRATORS Continued TO

FRAUD

an express contract for services, which contract was denied, instructions reviewed, and *held* (a) not to assume that the record showed evidence of such express agreement, and (b) to properly present defendant's claim that the home, food and clothing furnished claimant by decedent fully compensated her for all services rendered, and that the agreement contemplated that one should be in satisfaction of the other. In re Estate of Oldfield, 118.

FALSE REPRESENTATIONS. See **BANKS AND BANKING**, 1, 2; **FRAUD**, 2-5; **SPECIFIC PERFORMANCE**, 2.

FORCIBLE ENTRY AND DETAINER. See **APPEAL AND ERROR**, 1.

FRAUD.

FIDUCIARY RELATIONS.

Action to set aside deed: Evidence: Sufficiency. Evidence re-
1 viewed, and *held* wholly insufficient to set aside a solemnly executed deed on the ground of fraud growing out of alleged fiduciary relations. Johnson v. Tyler, 723.

FRAUDULENT REPRESENTATIONS.

Justifiable construction of language. One may not rely and act on
2 the language of a false representation, however vicious, beyond that meaning which has been placed on such language by (a) the approved usage of the language, (b) the meaning in law that a technical phrase may have attained, or (c) the law of the land. Farmers' Sav. Bank v. Jameson, 676.

Justifiable reliance: State bank loans. One who fraudulently
3 represents to a state bank that a proposed borrower is "good for any arrangement" which the bank may make with him is liable only for such loan as the bank may *legally* make to such borrower, to wit, a loan not exceeding 20 per cent. of its "actually paid-up capital." (Sec. 1870, Code Supp., 1913). And this is true even though such borrower could not, by reason of a violation of such law, defeat the collection from him of the loan, and even though the violation of law be conceded not to be a crime on the part of the bank. Farmers' Sav. Bank v. Jameson, 676.

FRAUD Continued TO FRAUDULENT CONVEYANCES

Damages: Payments: Application: Suretyship. Where a fraudulent representation to a bank as to the solvency of a proposed borrower was relied on by the bank by making loans far in excess of that which was justified by the representation, and the borrower repaid the bank an amount in excess of what the bank was justified in loaning on the representation, such repayment worked an entire discharge of the liability of the one making the representation. *Farmers' Sav. Bank v. Jameson*, 676.

Evidence: Insufficiency. Record reviewed, and held insufficient to establish the making of any *fraudulent* representation to a bank as to the solvency of a proposed borrower. *Farmers' Sav. Bank v. Jameson*, 676.

EVIDENCE.

Taking security from responsible party. Taking collateral security from a responsible party is not evidence of fraud. *Exchange Nat. Bank v. McCaffery*, 451.

Degree of proof. The following principles are recognized:

1. Fraud will not be presumed; nor will it be inferred from circumstances which, in the light of the entire case, are consistent with honesty.
2. Proof of fraud must be clear, satisfactory and convincing. Evidence reviewed, and held insufficient to show fraud in the claim of a bank to a bill of lading, with consequent right to the property prior to an attaching creditor. *Exchange Nat. Bank v. McCaffery*, 451.

FRAUDS, STATUTE OF. See QUIETING TITLE.

PERFORMANCE.

Sale of personal property. A contract for the sale of corporate stock fully performed by the vendor is not within the statute of frauds. *Conger v. Lee*, 423.

FRAUDULENT CONVEYANCES.

GROUNDS OF INVALIDITY.

Conveyance which does not defraud: Setting aside: Husband and wife. A conveyance of land, *fraudulent in fact*, will not be set aside at the instance of a creditor, ~~when the bank is already~~

FRAUDULENT CONVEYANCES Continued to

HOMICIDE

so heavily encumbered that no possible equity remained for the creditor intended to be defrauded. *Willey v. Hite*, 657.

Husband to wife: Joint accumulations. Evidence reviewed, and 2 held to show (a) that the claim of the wife that she owned the proceeds used in buying the land in question was unfounded, and (b) that said proceeds were the result of the joint efforts of husband and wife, and, the land being deeded to them jointly, they each owned an undivided half thereof. *Willey v. Hite*, 657.

GARNISHMENT.

PROCEEDINGS TO SUPPORT OR ENFORCE.

Controverting answer of garnishee: Jury question: Partnership funds. Issue joined in a garnishment proceeding by the judgment plaintiff of a partnership, on the allegation that the garnishee had properly accounted for all partnership funds by the discharge of partnership obligations, presents a jury question. *Peabody Buggy Co. v. Cooper*, 553.

GREAT BODILY INJURY. See **ASSAULT AND BATTERY**, 2-4; **CRIMINAL LAW**, 3.

GUARANTY.

CONSTRUCTION.

Unlimited guaranty: Rule of reason. A *general* guaranty of the solvency of a proposed borrower, *unlimited* both as to time and amount, may not be construed and acted upon by the guarantee to an extent which the guarantor did not and could not, in reason, intend or anticipate. *Farmers' Sav. Bank v. Jameson*, 676.

HARMLESS ERROR. See **APPEAL AND ERROR**, 22-24; **ASSAULT AND BATTERY**, 4; **NEGLIGENCE**, 2; **PROSTITUTION**, **HOUSE OF**, 2; **TRIAL**, 15.

HOMICIDE.

SELF DEFENSE.

Right to meet force with force. A person assaulted may always meet force with force, but no more than a battery may be

HOMICIDE Continued **TO** **INDICTMENT AND INFORMATION**
 inflicted unless this seems to be necessary to protect life or body from great harm, and not then if the assailed party have reasonable opportunity to withdraw and avoid the conflict, and it so appears to him as a reasonable person. *State v. Brackey*, 599.

HUSBAND AND WIFE. See ESTOPPEL, 2.

WIFE'S SEPARATE ESTATE.

Loss of time, etc.: Definiteness required. A married woman seeking to recover for loss of time, services, or inability to perform labor or earn money, on the claim that she is engaged in a business of her own, must segregate and make reasonably certain the items of loss for which she may recover from the items for which she may not recover. *Worez v. Des Moines City R. Co.*, 1.

ENTICING AND ALIENATING.

Excessive verdict: \$10,000. In computing the damages suffered by a wife because of the alienation of the affections of the husband for the wife, the all-important inquiry is: What has the wife lost in the way of affections? Were the relations between the wife and her husband, prior to the alienation by defendant, of the most amicable, harmonious and loving character, or had the wife, from other causes, already lost in large degree the affections of the husband? Tested by this rule, *held*, a verdict for \$10,000 was, under the record, excessive. *Porter v. Heishman*, 335.

Verdict: Sufficiency of evidence. Evidence reviewed, and held sufficient to support a verdict in some amount for the alienation of the affections of a husband for his wife. *Porter v. Heishman*, 335.

INDICTMENT AND INFORMATION.

REQUISITES AND SUFFICIENCY OF ACCUSATION.

Assault with intent: Manner of assault: Sufficiency. The manner in which and the means by which the accused intended to commit an assault with intent to inflict a great bodily injury are sufficiently alleged by the charge that the accused did then and there "beat, strike and bruise" the prosecuting witness. *State v. Brackey*, 599.

INSANITY

TO

INSURANCE

INSANITY. See EVIDENCE, 2, 13.**INSTRUCTIONS.** See TRIAL.**INSURANCE.****REINSURANCE.**

State laws governing. The laws of the state governing an *original*
 1 contract of insurance do not necessarily follow and become a
 part of subsequent contracts of *reinsurance*. Garretson v.
 Western Life I. Co., 172.

State laws governing. The laws of Indiana, under which a policy
 2 of insurance is issued, do not follow and become a part of
 a policy issued by an Illinois company, which reinsures a
 Pennsylvania policy, executed in lieu of the original Indiana
 policy; and especially so when the Pennsylvania policy was
 not a reinsurance of the original Indiana policy, but was a
 new and different policy. Garretson v. Western Life I. Co., 172.

Reciprocal rights and liability. General rule of law recognized that
 3 a reinsurer is only liable on *his* contract of reinsurance; that
 the assured may *reject* the offered reinsurance and sue on his
 original contract; or that he (the assured) may *accept* the
 reinsurance, and that, by accepting and paying premiums to
 the reinsurer, he cannot recover of such reinsurer on the
 original policy, unless his contract or necessary implication
 permits him to do so. Garretson v. Western Life I. Co., 172.

Estoppel to deny liability: Evidence. Evidence reviewed, and
 4 *held*, in an action on contracts of reinsurance, insufficient to
 estop defendant from insisting on the limited liability provided
 in the contract. Garretson v. Western Life I. Co., 172.

Liability: Evidence. Evidence reviewed, and *held* insufficient to
 5 show defendant's liability on contracts of reinsurance in excess
 of the limited liability pleaded. Garretson v. Western Life
 I. Co., 172.

ACCIDENT INSURANCE.

Existence of disease or bodily infirmity: Evidence. Under a pol-
 6 icy of accident insurance agreeing to pay indemnity "pro-
 vided that neither such injury nor inability is in consequence
 of nor contributed to by any bodily or mental defect, disease

INSURANCE Continued **TO** **JUDGMENT**
 or infirmity of the insured," evidence reviewed, and held to justify the finding that deceased was not suffering from hernia prior to the accident, and that there was no disease or bodily infirmity which was the cause of the death. *Keen v. Continental Cas. Co.*, 513.

General and limiting clauses: Construction. A general clause in
 7 a policy of accident insurance, providing a certain indemnity in case of death by accidental means, does not render nugatory a subsequent specific clause, limiting the indemnity in case an accidental injury results in certain named diseases. So held in case of an injury resulting in hernia. Liberty of contract justifies such a contract. *Keen v. Continental Cas. Co.*, 513.

Trial: Existence of disease or bodily infirmity: Instructions:
 8 **Sufficiency.** Instructions reviewed, and held to sufficiently present defendant's claim that deceased did not die solely from an injury effected through accidental means. *Keen v. Continental Cas. Co.*, 513.

JUDGMENT. See **ARBITRATION AND AWARD**, 2.

VALIDITY.

Burden of proof: Presumption. He who claims that a judgment
 1 is invalid because the entire proceedings were had in vacation has the burden of proof to make such fact affirmatively appear of record. It will be presumed that the judgment was rendered in term time. So held where the record showed an appearance by the defendant and a trial *by the court*. *White v. Harvey*, 213.

Estoppel by accepting benefits. A judgment plaintiff who has
 2 accepted the benefits of the judgment may not thereafter question its regularity. *White v. Harvey*, 213.

MATTERS CONCLUDED.

Splitting cause of action. An adjudication is final and conclusive,
 3 not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had determined as incident to or essentially connected with the subject matter of litigation. So held where a vendee in a contract of sale obtained, by reason of the vendor's failure to convey, a judgment for payments made on the contract and for improvements made on the property,

JUDGMENT Continued **TO** **LIBEL AND SLANDER**
and *subsequently*, and in a new action, sought to recover
damages for loss of his bargain. *White v. Harvey*, 213.

JUDICIAL NOTICE. See EVIDENCE, 1.

JURISDICTION. See APPEAL AND ERROR, 2; ARBITRATION
AND AWARD, 2.

JURY. See EMINENT DOMAIN; NEW TRIAL; TRIAL, 7.

RIGHT TO TRIAL BY JURY.

Federal Constitution. The Federal Constitution does not attempt
1 to regulate the granting or denying of jury trial by the state.
Hunter v. Colfax Cons. Coal Co., 245.

Scope of right. The right to jury trial is not absolute in the sense
2 that it has universal application. The right exists only in
cases where it existed at the adoption of the Constitution.
So held under the Workmen's Compensation Act. *Hunter v.*
Colfax Cons. Coal Co., 245.

Denial: Workmen's Compensation Act: Constitutional law. An
3 acceptance by an employer of the provisions of the Work-
men's Compensation Act (said act providing a proceeding to
administer the act without a jury) works an effectual waiver
of the employer's right to a jury trial. *Hunter v. Colfax*
Cons. Coal Co., 245.

LEX LOCI CONTRACTUS. See INSURANCE, 1, 2.

LIBEL AND SLANDER.

WORDS AND ACTS ACTIONABLE.

Personal defamation: Libels of property or business: Pleading.

1 An action for *personal* defamation by reason of an alleged
libel does not charge any defamation, slander or libel of
plaintiff's business by an allegation that plaintiff was engaged
in the restaurant business and that the defamation of his
person tended to injure him in his business. *Gundram v.*
Daily News Pub. Co., 60.

Libel per se: Ridicule. It is not libelous *per se* to publish of one
2 and his wife that they are living on cherries but otherwise
starving because of having failed in the chicken business;

LIBEL AND SLANDER Continued **TO** **MASTER AND SERVANT**
 that he had just mortgaged his chicken farm; that he had not said why he didn't eat chicken; that the wife said she wanted to forget chickens, etc. *Gundram v. Daily News Pub. Co.*, 60.

Libels per se: Presumptions: Falsity: Malice: Damages. Libels 3 *per se*—those prohibited by statute—carry, in addition to a presumption of falsity and malice, a presumption of damages; therefore, damages in such a case need not be proved; otherwise, if the libel is not such *per se*. *Gundram v. Daily News Pub. Co.*, 60.

LIMITATION OF ACTIONS.

CURRENT ACCOUNTS.

Services for decedents. Claims for services rendered for decedent, and continuously during a series of years, accrue on the date of the last item of the account. (Sec. 3449, Code, 1897.) In *re Estate of Oldfield*, 118.

MANDAMUS. See COSTS, 1.

MARRIAGE.

CONTRACT TO MARRY.

Breach of promise: Subsequent incurable disease: Effect. One may, without rendering himself liable in damages, refuse to consummate a contract of marriage when, at the time the contract is entered into, but unbeknown to him, he was afflicted with a fatal and incurable malady, of such nature that marriage would, to a reasonable certainty, aggravate it and hasten his death, and thereby defeat all consideration for the contract to marry. So *held* where the disease was pernicious anemia. In *re Estate of Oldfield*, 118.

MASTER AND SERVANT.

WORKMEN'S COMPENSATION ACT.

Non-negligence of employer. The Workmen's Compensation Act 1 (Secs. 2477-m to 2477-m51, Code Supp., 1913,) does not impose *absolute* liability on an employer who elects to reject the provisions of the act—does not deprive such employer of the right to plead and submit to a jury the defense that he was *wholly blameless* for an injury to an employee.

MASTER AND SERVANT Continued

Note: The above is true even in light of the fact that an employer who elects to reject the act is placed under the following handicaps, viz:

1. Denied the right to plead assumption of risk (a) inherent in the employment, or (b) incident to failure to furnish a safe place to work, safe tools, etc.
2. Denied the right to plead the exercise of reasonable care in selecting competent employees.
3. Denied the right to plead the negligence of a co-employee.
4. Denied the former benefits of contributory negligence, except in so far as such negligence reveals (a) willfully self-inflicted injuries and (b) injuries caused by intoxication; and
5. *Presumed* to have been proximately negligent in the event of an injury to the employee in the course of his employment, with resulting burden of proof on him (the employer) *to show to the contrary*. *Hunter v. Colfax Cons. Coal Co.*, 245.

Non-accepting employer: Contributory negligence as mitigating
3 damages. An employer who may elect to reject the provisions of the Workmen's Compensation Act may plead contributory negligence of the employee in mitigation of damages. (Sec. 3593-a, Code Suppl. Supp., 1915.) *Hunter v. Colfax Cons. Coal Co.*, 245.

Common-law defenses: Abrogation: Constitutional law. De-
3 priving the employer of the former common-law personal injury defenses, and relieving the employee of burdens of proof and transferring them to the employer as a penalty for his non-acceptance of the provisions of the Workmen's Compensation Act, do not constitute unreasonable coercion to induce acceptance of the act by the employer, the argument being, (a) that the legislature has undoubted constitutional right to arbitrarily withdraw any or all such defenses, or to change rules of evidence, and (b) that what the legislature may arbitrarily declare, it may conditionally declare—may declare as a penalty for non-acceptance of the act in question. *Hunter v. Colfax Cons. Coal Co.*, 245.

Abolition of defenses: Constitutional law. Depriving an employer
4 who alone rejects the provisions of the Workmen's Compensation Act of the defenses of contributory negligence, assumption of risk, and negligence of co-servants, violates no constitutional right of the employer, the reasons for such holding being placed, generally, on the thought (a) that such deprivation does not constitute an arbitrary classification, and (b) that such former defenses were only "court-made" rules and

MASTER AND SERVANT Continued

must yield to statutory policy. *Hunter v. Colfax Cons. Coal Co.*, 245.

Rejection by employee: Effect. An employee who elects to reject
5 the provisions of the Workmen's Compensation Act is penalized in that he arms the employer with the right to plead any and all defenses which he had the right to plead prior to the passage of said act. So held by construing Secs. 2477-m, m2, m9, as related sections. *Hunter v. Colfax Cons. Coal Co.*, 245.

Inherent risk of employment: Scope of doctrine. The risks which
6 "arise out of, inhere in, or are incidental to, an employment," have never been so generally held by the courts to include those risks only which occur *without fault of the master* as to justify the court in holding that the Workmen's Compensation Act, in taking from a non-accepting employer the right to plead the assumption of such risk by the employee, intended to deprive the employer of the right to plead that he was wholly blameless, especially when Sec. 2477-m of the act provides a way by which the employer may show that he was not negligent—was blameless. *Hunter v. Colfax Cons. Coal Co.*, 245.

Burden of proof: Statutory changes: Constitutionality. The
7 Constitution was not formerly violated in any of its provisions by the court-made rule that an employee must show that the employer was to blame for his injury: neither is the Constitution now violated by the provisions of the Workmen's Compensation Act that the employer must show that he was wholly blameless. *Hunter v. Colfax Cons. Coal Co.*, 245.

TOOLS, MACHINERY AND APPLIANCES.

Choice between safe and unsafe tools. A servant injured by reason
8 of an unsafe tool may not be defeated in his demand for damages by a showing that the master had other safe tools about the premises, *unless such safe tools were available for use by him*. *Petersen v. McCarthy Imp. Co.*, 85.

Negligence: Method of doing work: Impracticable method. A
9 servant injured through the use of unsafe tools may not be defeated in his action for damages because he did not employ another way which the evidence reveals was impracticable. *Petersen v. McCarthy Imp. Co.*, 85.

Defective material: Evidence. Evidence reviewed, and held suffi-
10 cient to sustain a finding that the master's nondelegable duty

MASTER AND SERVANT Continued TO

MORTGAGES

to furnish to his servant reasonably safe tools was violated by furnishing a carrying hook made of such soft metal that the same became easily dulled and would slip from the timbers which the servant was handling. *Petersen v. McCarthy Imp. Co.*, 85.

ASSUMPTION OF RISK.

Dangerous places: Knowledge of servant: Dangerous methods of
11 **work.**

(a) Deliberately choosing a dangerous rather than a safe method of performing work, with resulting injury to the servant, presents a case of both (1) assumption of risk and (2) contributory negligence. In such case, the servant's negligence becomes the proximate cause of the injury.

(b) The servant assumes the risk of all dangers against which he may protect himself by the exercise of ordinary observation and care.

(c) An employee assumes, as an incident of his service, any risk which arises from the permanent, visible and understood conditions of his master's plant.

(d) Recovery cannot be had when the servant voluntarily exposes himself to known and appreciated danger, or to a danger which he ought to know and appreciate by the exercise of ordinary care.

(e) It is not negligence to expose a servant to any danger which is obvious to, and understood and appreciated by, the servant. *Plantz v. Kreutzer*, 562.

Unsafe tools: Factory act. The plea of assumption of risk in
12 the use of unsafe tools is no longer available to an employer unless the employee is under a duty to repair, and not even then unless the danger from use is imminently perilous. So *held* in the use of a defective carrying hook. *Petersen v. McCarthy Imp. Co.*, 85.

MISDEMEANORS. See **CRIMINAL LAW**, 1.

MITIGATION OF DAMAGES. See **ASSAULT AND BATTERY**,
1; **MASTER AND SERVANT**, 2.

MORTGAGES.

RECORDING.

Failure to record: Loss: Who chargeable. When the non-recording of a mortgage results in loss by reason of inter-

MORTGAGES Continued **TO** **MUNICIPAL CORPORATIONS**
 vening rights, the mortgagor must suffer the loss, when his failure to *acknowledge* the mortgage prevented such recording. *Wagle v. Iowa State Bank*, 92.

MUNICIPAL CORPORATIONS. See NEGLIGENCE, 1; STATUTES, 1.

GOVERNMENTAL POWERS.

Telephone toll lines: Regulation. Whether cities and towns, in
 1 view of §§ 775, 776, and 2158, Code, 1897, have power to regulate telephone *toll* lines within their limits, *quære*. *State v. Iowa Tel. Co.*, 607.

PUBLIC IMPROVEMENTS—LAW GOVERNING.

Amendments to law: Applicability: Constitutional law. An
 2 amendment to a law governing the making of special assessments for public improvements will not be construed as applicable to proceedings already begun under the old law, and under which proceedings, rights have become fixed, when such construction would nullify the amendment by working a deprivation of the jurisdictional rights of the property owner, or by impairing the contract rights already existing. It follows that such pending proceedings should be continued pursuant to the terms of the original law. So *held* as to an amendment authorizing assessments on *adjacent* property, in addition to *abutting* property, as provided in the original law. (Sec. 792-g, Code Supp., 1913.) *Benshoof v. City*, 30.

PUBLIC IMPROVEMENTS—BOND.

Performance bond: Guarantee bond: Distinction. The funda-
 3 mental distinction between (1) a bond conditioned to *perform* the contract, as per specifications, and (2) a bond conditioned to *guarantee* the completed work for a given period, is that, under the former, liability under the bond is foreclosed by a good-faith conclusion and agreement that the work has been done "as per specifications;" while under the latter, liability attaches for mistakes, oversights and fraud in the original acceptance, and for hidden and future developing defects. *City v. McCarthy Imp. Co.*, 233.

Notice to reconstruct: Subsequently accruing damages: Non-neces-
 4 sity for second notice. Where a paving contractor was entitled

MUNICIPAL CORPORATIONS Continued to

NEGLIGENCE

to notice of the defective condition of paving as a condition precedent to liability for cost of reconstruction, *held*, one notice was all-sufficient, even though, subsequent to the giving of such notice, and after the city commenced reconstruction work, additional damage was done by an unusual storm. *City v. McCarthy Imp. Co.*, 233.

ASSESSMENT OF BENEFITS.

Inequitableness: Objections: Sufficiency. An objection filed with
5 a city council, charging that a proposed assessment is "inequitable" and was made under the "front-foot" rule, is sufficient to put in issue the question whether the assessment is equitable and in proportion to benefits, rather than in proportion to frontage. *Benshoof v. City*, 30.

Front-foot rule: Depth of lot. The *depth* of property, as well as
6 a frontage, is a consideration which should not be overlooked in arriving at an assessment of benefits. An assessment manifestly based on the "front-foot" rule, and in total disregard of the depth, is, in present case, held to be inequitable. *Benshoof v. City*, 30.

NEGLIGENCE. See CARRIERS, 4-6; MASTER AND SERVANT;
RAILROADS.

ACTS OR OMISSIONS CONSTITUTING.

Public improvements: Obstructing public streets: Barriers:

- 1 **Warnings.** The maintenance, in a public street, by a contractor engaged in laying paving in said street under authority of the city, of a concrete mixer so placed as to impede travel by pedestrians on the sidewalk, is not, of itself, a negligent act on the part of the contractor, but may become such by failure to exercise reasonable care (a) to erect a barrier to turn pedestrians from the path of danger (b) to give pedestrians warning of the danger, or (c) to discover the danger to a pedestrian and to prevent his injury. Evidence reviewed, and held to present a jury question as to defendant's negligence. *Law v. Bryant Asph. Pav. Co.*, 747.

Instructions: Erroneous instructions: Harmless error. A misdi-

- 2 rection as to what will constitute negligence on the part of defendant is entirely harmless when the jury returns a verdict for plaintiff, and thereby necessarily finds that defendant was negligent. *Worez v. Des Moines City R. Co.*, 1.

NEGLIGENCE Continued

LICENSES.

Non-licensed use of premises: Effect. It is suggested that a
3 license to cross private grounds for one purpose affords no protection to the licensee when crossing such premises for a purpose for which he has no license. *Wilmes v. Railway Co.*, 101.

ATTRACTIVE AGENCIES.

Trespassers: Railway wreck. An owner or occupant of premises
4 owes no duty to an infant who, without the knowledge or invitation, express or implied, of such owner or occupant, goes, out of idle curiosity, upon such premises, and is injured by some dangerous agency. And the existence of a railway wreck, consisting of two overturned box cars and promiscuously interwoven trackage, does not constitute such a known, attractive and dangerous agency as to amount to an implied invitation to children to come upon the premises, out of idle curiosity, to view it, and thus bring the child within the "law of attractive agencies." *Wilmes v. Railway Co.*, 101.

PROXIMATE CAUSE.

Neutralising negligence of master. Due care by a servant—freedom from contributory negligence—may demonstrate that the negligence of the master was not the proximate cause of the injury, and thus defeat the employee. *Petersen v. McCarthy Imp. Co.*, 85.

Negligence of master: Injury Causal connection. No causal connection between negligence proven and injury suffered, no recovery. *Peterson v. Phillips Coal Co.*, 223.

CONTRIBUTORY NEGLIGENCE.

Workmen's Compensation Act: Willfully self-inflicted injuries:
7 **Drunkenness.** Contributory negligence is a defense still preserved to an employer who elects to reject the provisions of the Workmen's Compensation Act, in so far only as such negligence shows (a) willfully self-inflicted injuries, and (b) injuries caused by the employee's intoxication. *Hunter v. Colfax Cons. Coal Co.*, 245.

Obstruction in highway. Record reviewed, and held to present a
8 jury question whether plaintiff, in passing a concrete mixer

NEGLECT Continued

TO

NEW TRIAL

located in a public street and obstructing travel by pedestrians, was guilty of contributory negligence. *Law v. Bryant Asph. Pav. Co.*, 747.

Automobile accident: Evidence: Sufficiency. Evidence reviewed, 9 in an action by plaintiff for personal injuries suffered in an automobile accident, and *held* to present such conflict as to preclude a directed verdict on the ground that plaintiff was guilty of contributory negligence. *Kimbrow v. Moles*, 528.

Children: Negligence per se. Evidence reviewed, and held not to charge the deceased, a young, 13-year-old boy, with contributory negligence as a matter of law. *Johnston v. Delano*, 498.

"NO EYEWITNESS" RULE

Children: Presumptions. An action for damages for negligently causing the death of a 13-year-old boy, with no eyewitness as to the manner in which he was conducting himself as he approached and went upon the point of danger, is aided by two presumptions, both rebuttable by the defendant, and both furnishing substantive evidence on the question of due care, viz.:

1. That a child under the age of 14 years has not negligently contributed to his own injury.
 2. That he exercised reasonable care for his own safety.
- Johnston v. Delano, 498.

Rule reaffirmed. The "no eyewitness" rule, as heretofore applied 12 in this court, is reaffirmed. *Johnston v. Delano*, 498.

IMPUTED NEGLIGENCE.

Children: Reliance on adult. The negligence of a man of mature 13 years is not imputable to a 13-year-old boy riding with him. He has a right to reasonably rely on the driver's superior age, etc., without being chargeable with contributory negligence *per se*, and a jury (there being no eyewitness of the accident and the attending circumstances) may very properly find that he did so rely, even though there is no evidence of such fact. *Johnston v. Delano*, 498.

NEW TRIAL. See **TRIAL.**

GROUND—IN GENERAL.

Odor of untruthfulness in record. An unavoidable odor of untruth-
fulness surrounding testimony which manifestly is the sole

NEW TRIAL Continued

support for a verdict, may be sufficient to demand the *granting* of a new trial and may even justify the appellate court in overturning the action of the lower court in *refusing* a new trial; and this, too, while giving recognition to the rule that the credibility of witnesses and the weight of their testimony is for the jury. So *held*, under exceptional circumstances, where the belated testimony of a single witness, impeached by his own former signed statements and persuasively discredited by the attendant circumstances, supplied, in a personal injury action, the only possible causal connection between the negligence alleged and the injury suffered. *Peterson v. Phillips Coal Co.*, 223.

MISCONDUCT OF JURY.

Unwarranted discussion. The conclusion of the trial court on conflicting testimony as to whether the jury indulged in unwarranted discussion and statements, or was otherwise guilty of misconduct, is conclusive on the appellate court. *Becker v. Inc. Town of Churdan*, 159.

MISCONDUCT OF BAILIFF.

Unauthorized statements to jury. Misconduct of a bailiff without an affirmative showing of prejudice is not ground for a new trial. *Held*, certain jesting remarks of a bailiff to some of the jury as to the time they would be kept together in the absence of an agreement were not sufficient grounds for a new trial. *Becker v. Inc. Town of Churdan*, 159.

NEWLY DISCOVERED EVIDENCE.

Diligence. Newly discovered evidence without a showing of diligence in discovering it is not sufficient to justify a new trial. So *held* where the newly discovered evidence was either from those (a) who were witnesses on the former trial, or (b) who were present on the former trial and referred to by witnesses as having knowledge of the controversy. *Becker v. Inc. Town of Churdan*, 159.

Documentary evidence. The discovery of documentary evidence, fully covered by secondary evidence on the former trial, is not sufficient to justify a new trial. *Becker v. Inc. Town of Churdan*, 159.

NEW TRIAL Continued

TO

PARENT AND CHILD

DISCRETION OF COURT.

Action for recovery of real property. The appellate court, always
6 reluctant to set aside an order granting a new trial, is especially so *when the action is for the recovery of real property.* (Sec. 4205, Code, 1897.) *Daniels v. Butler*, 439.

PROCEEDINGS TO PROCURE.

Petition after reversal: Equity cause. An appellee, who suffers
7 a reversal in the Supreme Court in an equity case, may, upon entry of judgment against him in the lower court under *procedendo*, be granted a new trial under proper petition therefor. (Sec. 4092, Code, 1897.) A petition filed on the day when such latter judgment is entered is especially timely. *Daniels v. Butler*, 439.

OFFICERS. See CONSTITUTIONAL LAW, 4.

VACANCIES AND HOLDING OVER.

Death of re-elected incumbent: Right of appointee. The death
1 of the re-elected incumbent of a public office before entering upon the new term creates a vacancy in the term which he was serving *at the time of his death*, but not in the new term *for which he had been elected.* (Sec. 1266, Code, 1897.) It follows that the duly appointed and qualified appointee to fill such vacancy possesses two rights: (1) To serve for the balance of such existing term, and (2) to hold over until the next general election, for the new term for which deceased was elected, provided he qualifies anew, within 10 days after such new term commences. (Secs. 1265, 1275, Code, 1897; Secs. 1060, 1177, Code Supp., 1913; Constitution, Art. 11, Sec. 6.) *State v. Carvey*, 344.

TITLE TO OFFICE.

Burden of proof. Relator in *quo warranto*, seeking to establish
2 his right to a public office as a rival claimant thereto, must recover, if at all, on the strength or validity of his own title to the office, and not upon the weakness or defective character of the incumbent's title. *State v. Carvey*, 344.

PARENT AND CHILD. See DEATH, 1.

PAYMENT

TO

PLEADING

PAYMENT. See FRAUD, 4.**PLEADING.** See ACCOUNT, ACTION ON, 1; EVIDENCE, 17.**CONSTRUCTION OF PLEADING.**

Form and allegation: Allegation governs effect: Misnomer. A
1 pleading will be given effect according to its allegations, not
according to the particular name which the pleader sees fit
to apply thereto. "Motion" for new trial properly treated as
"petition" for new trial. *Daniels v. Butler*, 439.

Future pain: Conditions surrounding trial and verdict. On the
2 question whether a pleading counts on future pain and suf-
fering, i. e., later than time of trial, the appellate court will
give material consideration to the conditions surrounding the
trial, including the time elapsing from the date of injury to
date of trial, and the smallness of the verdict which the lower
court held to be justified by the evidence. *Worez v. Des Moines*
City R. Co., 1.

MATTERS SPECIALLY PLEADABLE.

Principal and agent: Ratification. Ratification by a principal of
3 the unauthorized act of his agent need not be specially pleaded
—may be shown under a general allegation that the act in
question was the act of the principal. *Dodd v. Groos*, 47.

Personal injury: Future pain: Sufficiency of pleading. Pain and
4 suffering subsequent to time of trial must be specifically
pleaded, if such pain and suffering do not naturally follow
proof of that which is pleaded; and the lapse of a long time
between the filing of petition and date of trial may have
material bearing on the question. Pleadings reviewed, and
held not to count on such pain and suffering later than the
time of trial. *Worez v. Des Moines City R. Co.*, 1.

AMENDMENTS.

Amendments after reversal: Discretion of court. Amendments
5 raising new issues may be allowed, even after a reversal on
appeal. In re *Estate of Oldfield*, 118.

Failure to request continuance: Waiver. If no continuance is
6 asked on account on an amendment, complaint cannot after-
wards be made that time was not granted. *Exchange Nat.*
Bank v. McCaffery, 451.

PLEADING Continued
MOTIONS.

TO

PRESUMPTIONS

Motion for judgment on pleadings: When allowable. A motion
7 for judgment on the pleadings is proper whenever, in the
opinion of the mover, the answer raises no issue of fact to
be tried, and the allegations of the petition and answer, taken
as true, entitle him to the relief prayed. And this is true
even though a demurrer might reach the same result. *State*
v. Carvey, 344.

Judgment on motion: Effect. A motion by plaintiff for judgment
8 on the pleading necessarily admits the truth of affirmative
matters pleaded in the answer. *State v. Carvey*, 344.

Motion to strike motion. A motion to strike another motion is
9 unknown to our practice. *State v. Carvey*, 344.

PRAYER.

Designatio unius exclusio alterius. A prayer for relief, resting
10 on distinctly enumerated elements of loss, excludes all other
elements of loss. Therefore, where plaintiff pleaded that she
sustained injuries (a) to certain muscles, (b) to her spinal
column, all resulting in great physical and mental pain, and
prayed for a recovery of \$12,000, *held*, said pleading covered
no claim for "loss of time or services or inability to perform
labor or earn money," or expenditures of any kind. *Worez*
v. Des Moines City R. Co., 1.

ISSUE, PROOF, AND VARIANCE.

Issue without written plea: Waiver. One may not be said to have
11 mutually agreed with his adversary to try out an issue not
raised in the written pleadings, by failing to object to evi-
dence which, though bearing on and tending to prove such
non-paper issue, was also admissible on other issues which the
written pleadings did raise. *Worez v. Des Moines City R.*
Co., 1.

POLICE POWER. See CONSTITUTIONAL LAW, 9.

PRESUMPTIONS. See ATTORNEY AND CLIENT; CARRIERS, 6;
DEEDS, 4; DRAINS, 4; EVIDENCE; FRAUD, 7; JUDGMENT, 1;
MASTER AND SERVANT, 1; NEGLIGENCE, 11; TELEGRAPHS
AND TELEPHONES, 2.

PRINCIPAL AND AGENT TO PROSTITUTION, HOUSE OF
PRINCIPAL AND AGENT. See **BROKERS**, 1-3; **PLEADING**, 3.

THE RELATION.

Purchasing property for another: Sales. A contract by which
 1 one party agrees to purchase personal property for the other
 and the other agrees to receive it and pay the price on delivery,
 is a contract of agency for such purchase, not a contract for
 the sale of the property, and manifestly so where the party
 making the purchase is acting for the other and not for him-
 self. So *held* in a transaction involving the purchase of
 corporate stock. *Foley v. Nimocks*, 464.

Sufficiency of evidence. Evidence reviewed, and *held* insufficient
 2 to constitute the relation of principal and agent. *Wagle v.*
Iowa State Bank, 92.

COMPENSATION.

Rights of agent: Reimbursement for losses, etc. A principal is
 3 under obligation to reimburse his agent for all good-faith
 disbursements made and losses suffered in the proper execution
 of the agency. *Foley v. Nimocks*, 464.

UNAUTHORIZED ACTS OF AGENT.

Waiver of unauthorized provisions: Promptness required. It is
 4 possible that the *unauthorized* parts of a written contract
 made by an agent in the name of his principal may be waived
 and relinquished by the other party to the contract and the
 remaining part enforced, but such waiver and relinquishment
must be promptly made. *Dodd v. Groos*, 47.

PROSTITUTION, HOUSE OF.

CORPUS DELICTI.

Evidence to establish. A charge of keeping a house of prostitution
 1 must, as a rule, be established by showing (a) the bad repu-
 tation of the house, (b) the purpose actuating those who
 resorted to the house, (c) the character of the persons occupy-
 ing the house, and (d) the indecent familiarities and conver-
 sations occurring between the occupants thereof. It is not
 necessary that the State show that acts of illicit carnal
 intercourse actually took place in the house. *State v. Flynn*,
 604.

PROSTITUTION, HOUSE OF Continued to
EVIDENCE.

RAILROADS

Reputation of inmates: Specific acts of misconduct: Harmless
2 **error.** Whether, in a prosecution for keeping a house of prostitution, the reputation of the inmates may be established by evidence of *particular acts, quære*; but when inmates were shown without dispute to be prostitutes, *held* harmless error to permit a witness to testify that he had arrested such inmates for "disorderly conduct." *State v. Flynn*, 604.

PROXIMATE CAUSE. See DAMAGES, 1; NEGLIGENCE.

QUANTUM MERUIT. See ACCOUNT, ACTION ON.

QUIETING TITLE.

RIGHT OF ACTION.

Oral agreement to sell: Consideration delivered. Title will be
quieted against one who orally agrees to sell his interest in lands, followed by the delivery by the purchaser of the consideration, as per contract. *Lanz v. Schumann*, 542.

RAILROADS. See COSTS, 1; DRAINS, 2.

STATUTORY REGULATION—CROSSINGS.

Undercrossing: Reasonableness: Evidence. Grade crossings are
1 the rule in this state. Evidence reviewed, and held to show that plaintiff's demand for an undercrossing was unreasonable, and therefore should be denied. *Klopp v. Railway Co.*, 534.

Undercrossing: Excessive cost: Materiality. A landowner is
2 entitled to an "adequate" crossing, even though the cost be great, but the cost of an undercrossing is a circumstance proper to be taken into consideration with all the other circumstances of the case. So held where the cost of the undercrossing approximately equaled the value of the farm. *Klopp v. Railway Co.*, 534.

Undercrossing: Failure to furnish: Damages. Record reviewed
3 and held insufficient on which to base a claim for damages for alleged failure to furnish a crossing. *Klopp v. Railway Co.*, 534.

RAILROADS Continued

to

RES IPSA LOQUITUR

ACCIDENTS AT CROSSINGS.

Non-stopping of train: Care required. The conceded right to
 4 operate trains through a city or town without stopping must be exercised with due regard to those rightfully on or about crossings, even though the crossings are not strictly public. Evidence reviewed, and held to justify a finding of negligence. *Grafton v. Delano*, 483.

Semi-public crossing: Duty. While it may not be incumbent upon
 5 a railroad company to give the statutory signal warnings at a semi-public crossing, yet its duty is ever present to exercise at such crossings a degree of care proportionate to the known, or reasonably to be apprehended, peril to be avoided. *Johnston v. Delano*, 498.

Statutory signals—Semi-public crossing. The failure to give the
 6 statutory warning signals at a place required by law—for instance, at a public crossing—may be the proximate cause of a collision at a near-by place where by law such signals are not required—for instance, at a semi-public crossing. *Johnston v. Delano*, 498.

Lookout: Failure to keep: Negligence. Evidence reviewed, and
 7 held to justify a finding of negligence on the part of a train crew in not keeping a proper outlook for persons on or about a semi-public crossing. *Johnston v. Delano*, 498.

Negligence: Sufficiency of evidence. Evidence reviewed, and held
 8 to clearly present a question for the jury as to defendants' negligence in running their train at a high rate of speed and without proper lookout, over a semi-public crossing. *Johnston v. Delano*, 498.

No eyewitnesses: Contributory negligence. The presumption in-
 9 dulgued in the absence of eyewitnesses is substantive evidence upon which the jury may find want of contributory negligence; at least, the existence of such presumption is quite influential in depriving the court of the right to pass upon such question. *Grafton v. Delano*, 483.

RES GESTAE. See EVIDENCE.

RES IPSA LOQUITUR. See CARRIERS, 6.

SALES TO **SPECIFIC PERFORMANCE**
SALES. See **PRINCIPAL AND AGENT**, 1.

CONSTRUCTION OF CONTRACT.

Transfer of title: Purchase for another. Personal property purchased by one in his own name, with his own funds, but purchased for another at such other's request and under an agreement to reimburse the one purchasing, belongs to the one for whom purchased. So held in the purchase of corporate stock. *Foley v. Nimocks*, 464.

WARRANTIES.

Patent defect. There may be an express warranty against the consequences of a patent defect. So held in the warranty of a horse. *Hull v. Dannen*, 713.

Construction. A specific written warranty may be read in the light of the competent testimony. So held as to a written warranty of the soundness of a horse. *Hull v. Dannen*, 713.

SELF-DEFENSE. See **ASSAULT AND BATTERY**, 4; **HOMICIDE**.

SLANDER. See **LIBEL AND SLANDER**.

SPECIFIC PERFORMANCE.

CONTRACTS ENFORCEABLE.

Delivery on condition: Performance. A contract to buy certain land, executed and delivered on the condition that the vendor will effect an exchange of other land belonging to vendee for certain lands belonging to a third party, is not enforceable when said exchange progressed no further than the signing of a contract by vendee and said third party and the repudiation of said contract, under the terms thereof, by both parties, after examination of the land. *Irving v. Wagner*, 198.

Inducing contract by fraud: Representations as to value. Representations of value, made for the purpose of having them accepted as of fact and to be relied on, are representations of fact, and, if actually relied on and false, will defeat specific performance. *Irving v. Wagner*, 198.

STATUTES

STATUTES.

REPEAL—EFFECT.

Municipal improvements. The repeal of a statute does not affect

- 1 any right which has accrued, any duty imposed, or any proceeding commenced under or by virtue of the statute repealed. So *held* on the question whether paving proceedings already begun under a law authorizing assessments on *abutting* property were affected by a subsequent law requiring assessments on both *abutting* and *adjacent* property. (Sec. 48, Par. 1, Code, 1897.) *Benahoof v. City*, 30.

CONSTRUCTION AND. OPERATION.

Forfeiture: Prospective or retrospective operation: Implied re-

- 2 **peals: Telephone franchises.** Three cardinal principles of statutory construction are:

1. Forfeitures are in disfavor. A statute which is relied on as forfeiting an acquired right (assuming the right to declare such forfeiture) must be so clear as to remove all reasonable doubt as to the legislative intent.

2. A statute, in the absence of an unequivocal intent to the contrary, will be construed prospectively and not retrospectively.

3. Repeals by implication are not favored. So *held* and applied where it was claimed that a special telephone franchise, acquired under direct statutory grant from the state, had been repealed and forfeited by subsequent statutes enacted under color of certain powers reserved by the state in its Constitution and statutes. *State v. Iowa Tel. Co.*, 607.

Prospective and retroactive construction. Statutes will be given

- 3 a prospective, instead of retroactive, effect, in the absence of a clear intent to the contrary. So *held* on the question whether paving proceedings already begun under a law authorizing assessments on *abutting* property were affected by a subsequent law requiring assessments on both *abutting* and *adjacent* property. (Sec. 792-g, Code Supp., 1913.) *Benahoof v. City*, 30.

Radical innovations: Judicial legislation. Radical departures from

- 4 long-established rules of law will not be *construed* into existence. They must be *created* by plain words, not of the judiciary but of the legislature. So *held* under the claim that the Workmen's Compensation Act deprived an employer who

STATUTES Continued

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TAXATION

elected to reject the act of the right to establish that he was wholly blameless for an act. *Hunter v. Colfax Cons. Coal Co.*, 245.

Strained applications of terms. Provisions of a connected statute, 5 manifestly intended to be comprehensively complete in itself, cannot, by judicial construction alone, be bodily lifted out of the statute and held to apply solely to another statute enacted prior to the one in question. So *held* with reference to the claim that the provision of the Workmen's Compensation Act (enacted in 1913) which creates a *presumption* of proximate negligence against the employer and places on him the burden of proof to show the contrary was intended to have application, not to the act in which it was found, but solely to the Mining Act (enacted in 1911). *Hunter v. Colfax Cons. Coal Co.*, 245.

Contradictory construction. A provision of a statute cannot be 6 held to have some application and at the same time to be surplusage only. *Hunter v. Colfax Cons. Coal Co.*, 245.

Direct legislative grant in perpetuity: Non-repeal by subsequent 7 statutes: Telephones. The special franchise in perpetuity to use the public highways for telephone purposes, acquired under specific authority of § 1324, Code, 1873, as amended by Chap. 104, Acts of the 19th General Assembly, was, irrespective of any "reserved power" in the state, ~~NOT FORFEITED OR INTENDED TO BE FORFEITED~~ by the enactment of any of the following statutes, to wit:

1. Chap. 16, Acts 22d G. A.
2. § 775, Code, 1897.
3. § 776, Code, 1897.

Held, further, (a) the *regulatory* features of these three statutes applied to *all* special telephone franchises (the right to use the public highways, as distinguished from a *corporate* franchise), howsoever or whensoever obtained, but (b) the *authorisation* features—the power of the city to grant such special franchise—had no application to such a franchise already possessed under direct legislative authority from the state, to wit, § 1324, Code, 1873. *State v. Iowa Tel. Co.*, 607.

TAXATION.

NATURE AND EXTENT OF POWER.

Purpose of tax: Workmen's Compensation Act: Compulsory insurance: Police power. The compulsory scheme of insurance

TAXATION Continued**TO****TRESPASSERS**

provided by the Workmen's Compensation Act, to secure workmen injured in hazardous employments and their dependents from becoming objects of charity, tends to the accomplishment of an object well within the "police power" of the state, and the cost, on the employer, of maintaining such scheme of insurance, if conceded to be a *tax*, is a tax for a *public purpose*, even though not wholly so. *Hunter v. Colfax Cons. Coal Co.*, 245.

TELEGRAPHS AND TELEPHONES. See CONSTITUTIONAL LAW, 11; MUNICIPAL CORPORATIONS, 1.

ESTABLISHMENT AND MAINTENANCE.

Franchise: Revocability: Reserve power of state. A telephone
 1 company which, prior to the taking effect of the Code of 1897 (Oct. 1, 1897), erected and operated its telephone equipment upon and along the public highways of the state under authority of § 1324, Code, 1873, as amended by Chap. 104, Acts of the 19th General Assembly (which, without limitation as to time, authorized it to so do), thereby created contract relations between itself and the state of Iowa, and became possessed, not of a mere revocable license, but of a special franchise in perpetuity—a perpetual right to use such highways for both long distance and local telephone purposes—a right subject to no limitation except the permissible exercise of (a) the *police power* of the state and (b) the *reserve power* then existing in the Constitution and statute laws of the state. *State v. Iowa Tel. Co.*, 607.

DELIVERY OF MESSAGE.

Evidence: Presumption of delivery: When. No presumption of
 2 "delivery" arises from the naked fact that a telegram properly addressed and signed is found in the files of a telegraph company. *City v. McCarthy Imp. Co.*, 233.

TRANSACTIONS WITH DECEASED. See WITNESSES.

TRESPASSERS. See NEGLIGENCE, 4.

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PROPER CALENDAR.

Transfer on calendar: Motion: Timeliness. Motions to transfer from law to equity should be timely. *Garretson v. Western Life I. Co.*, 172.

CONDUCT OF COURT.

Observation as to witness's knowledge. The appellate court will not hypercritically analyze every remark of the trial court in passing on the admission or rejection of evidence, and assume that the jury must have understood that the court was, reflecting on the witness's former testimony on the point in question. So *held* where the court, in rejecting offered testimony, expressed his inability to understand how the witness could have knowledge on a certain point. *Worez v. Des Moines City R. Co.*, 1.

RECEPTION OF EVIDENCE.

Order of proof: Discretion of court. Testimony on the main case may be properly received after argument on motion for directed verdict. *Peterson v. Phillips Coal Co.*, 223.

Order of proof: Discretion of court. Testimony which is admissible, for any reason, on rebuttal is not rendered inadmissible because it might have been received on the main case. *Kimbrow v. Moles*, 528.

ARGUMENT AND CONDUCT OF COUNSEL.

Argument: Opening and closing: Determination of right. The right to open and close an argument is usually controlled by the pleadings. *Held*, motion made at the close of all the evidence, that defendant be granted the right to open and close, was properly denied, the record then showing serious dispute as to issues on which plaintiff, under the pleadings, had the burden of proof. *Fagg v. Railway Co.*, 459.

Acting for two clients with same interests: Misconduct. An attorney is not guilty of conduct inconsistent with his duty by acting for one client in a criminal action and for another and different client in a civil action, both actions growing out of the same transaction, when the interests of the two clients are

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identical, even though the conduct and advice of the attorney results in depriving the defendant in the civil action of the testimony of the defendant in the criminal action. *Weber v. Railway Co.*, 358.

INSTRUCTIONS—DUTY OF JURY.

Duty of jury to obey. The instructions constitute the law of the case for the jury, and a judgment on a verdict contrary to the instructions will be reversed. *Steele v. Ingraham*, 653.

INSTRUCTIONS—FORM, REQUISITES AND SUFFICIENCY.

Correct though inexplicit. The right to explicit instructions will be considered waived in the absence of a request therefor, when the instructions given are correct as far as they go. So held as to instructions governing matters in mitigation of damages. *Fagg v. Railway Co.*, 459.

Quasi public crossing. An instruction that a certain quasi public railway crossing was "in the nature of a private crossing" was sufficiently accurate and wholly non-misleading. *Grafton v. Delano*, 483.

Test of preponderance of testimony. It is not prejudicial error for the court to state in an instruction that the test of "preponderance and weight of the testimony is where you believe the truth to be after hearing all the evidence." *Johnston v. Delano*, 498.

General test: Negligence. Not what a minute, technical or hyper-critical analysis of an instruction might show is its possible meaning, but what idea is the language fairly calculated to convey to the minds of jurors drawn from the ordinary walks of life. Instructions reviewed, and held to correctly cover, with reasonable fullness, the relative rights and duties of a public contractor in handling his machinery in a public street, and of a pedestrian walking along such street. *Law v. Bryant Asph. Pav. Co.*, 747.

INSTRUCTIONS—APPLICABILITY TO PLEADING AND EVIDENCE.

Pleading express contract: Recovering on implied one. In an action to recover against the estate of a decedent on an express contract for services, an instruction that "direct evidence of such agreement is not necessary if, from all the facts and

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circumstances appearing in evidence in the case, you can find by a preponderance of the evidence that there must have been such an agreement," is not subject to the vice of allowing a recovery on an *implied* agreement, especially when the jury was otherwise told that claimant must recover, if at all, on proof of an express agreement. In re Estate of Oldfield, 118.

Issues. Manifestly, the court should not submit a question not at 13 issue. Emeny Auto Co. v. Neiderhauser, 219.

Speculation on facts without evidence. An instruction is manifestly erroneous which turns the jury loose in the zone of mere speculation and permits them to find the existence of facts, (a) without evidence and (b) in flat contradiction to the only rational inference which the testimony will bear. Plantz v. Kreutzer, 562.

INSTRUCTIONS—HARMLESS ERROR.

Psychological effect on verdict. Where the jury returned a verdict 15 for plaintiff, in spite of the fact that, by an erroneous instruction, the court gave defendant an unjustifiable chance to escape, error may not be predicated, on appeal, because of the inadequacy of the verdict, on the subtle argument that such erroneous instruction had a bad psychological effect on the amount of the verdict. Worez v. Des Moines City R. Co., 1.

SPECIAL INTERROGATORIES.

Non-controlling matters. Special interrogatories, calling for non-16 controlling matters and matters not of ultimate fact, are properly refused. Fagg v. Railway Co., 459.

Attempt to cross-examine jury. Special interrogatories which par-17 take more of the nature of a cross-examination of the jury than a submission of ultimate questions of fact are properly refused. Johnston v. Delano, 498.

Submission on motion of court. The court may, on its own motion, 18 submit special interrogatories to the jury, calling for special findings on material and relevant issues. So held in an action on account. (Sec. 3727, Code, 1897.) Emeny Auto Co. v. Neiderhauser, 219.

VERDICT.

Form of verdict: Inaccurate terms. The use of inaccurate terms 19 in preparing forms of verdict for the jury will be treated as

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harmless, when the form as a whole is clear. *Exchange Nat. Bank v. McCaffery*, 451.

Excessiveness: \$9,024. Verdict of \$9,024 for death sustained. De-
20 ceased was 53 years of age, his expectancy was some 16 years,
was earning \$1,000 a year, was industrious and saving, had
accumulated a home and six town lots, several cows, a team
and some pigs and poultry, all of which animals were a source
of profit to him. *Grafton v. Delano*, 483.

VENDOR AND PURCHASER. See **CONTRACTS**, 1; **ELEC-
TION OF REMEDIES**; **ESTOPPEL**, 1.

CONSTRUCTION OF CONTRACT.

Options: Election. In case an option exists to do either of two
things, he who is under obligation to first act in reference
thereto has the election. *Dodd v. Groos*, 47.

VERDICT. See **APPEAL AND ERROR**, 25; **CRIMINAL LAW**, 4;
TRIAL.

VESTED RIGHTS. See **CONSTITUTIONAL LAW**, 11.

WARRANTY. See **SALES**.

WATERS AND WATERCOURSES.

EASEMENT.

Degree of proof. Easements in artificial watercourses at war with
1 the order of nature should only be established by evidence
which is clear and satisfactory. *Lehfeldd v. Bachmann*, 202.

Evidence: Sufficiency. Evidence reviewed, and held insufficient to
2 establish a contract for the construction and maintenance by
adjoining landowners of an artificial watercourse. *Lehfeldd
v. Bachmann*, 202.

WILLS.

UNDUE INFLUENCE

Fiduciary relations: Burden of proof. A showing that a devisee
1 himself drew the purported will at a time when only he and

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the infirm and aged testatrix were present, coupled with a further showing that said devisee then occupied an intimate fiduciary relation towards testatrix, may be sufficient to raise a presumption that the purported will was the result of the undue influence of said devisee, with consequent burden on devisee to rebut the unfavorable presumption. *Squires v. Cook*, 586.

Evidence: Connected transactions. What amount of property a
2 devisee, charged with undue influence on his infirm and aged mother, received out of his father's estate, may be so connected with the making of the mother's will and the contest thereon as to become decidedly material. *Squires v. Cook*, 586.

Evidence. On the question whether the purported will of an infirm
3 and aged testatrix was induced by the undue influence of her son, evidence is admissible that the son and his wife interfered with the visits of partially disinherited heirs to their mother. *Squires v. Cook*, 586.

Evidence. On the question of the value of the estate of a mother
4 whose will was under contest, evidence of the value of the personal property of her deceased husband may become material, the mother having received a portion of the latter. *Squires v. Cook*, 586.

Evidence. On the question of undue influence, it may be shown
5 that he who is charged with having exercised such influence had been known to physically abuse testatrix. *Squires v. Cook*, 586.

Fiduciary relations: Evidence. Evidence reviewed, and held to
6 present a jury question whether the will was the result of the undue influence of a devisee, who himself drew the will at a time when no one was present but himself and deceased, and who was then occupying a fiduciary relation towards the aged deceased. *Squires v. Cook*, 586.

CONSTRUCTION.

"Equal portion." The intent of the testator prevails, in the con-
7 struction of a will, over (a) any arbitrary or technical rules of construction, (b) the form of the will, and (c) the order in which the devisees are given. The construction of the will in question held to evince an intention to divide the devisees into two distinct classes and to give each class an "equal

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portion," even though one class embraced but one person.
In re Estate of Whittaker, 718.

WITNESSES.

COMPETENCY.

Transaction with deceased. The *interest* which will destroy the
1 competency of a witness to testify to a transaction with a
deceased must be *direct* and *present*. *Held*, a stockholder in
a bank was not incompetent to testify to the facts attending
the execution of a deed by deceased to grantee, simply because
the grantee was a debtor of the bank. *Kyle v. Kyle*, 734.

PRIVILEGED COMMUNICATIONS.

Stenographer. A communication by an employer to his stenographer
2 is not privileged unless made (a) by reason of the employ-
ment, (b) confidentially and (c) because necessary and proper
to enable such employee to discharge her usual duties. (Sec.
4608, Code, 1897.) *Ewing v. Hatcher*, 443.

CROSS-EXAMINATION.

Limitation. Prejudice may not be predicated on a limitation
3 placed on the cross-examination of a witness (a) when the
matter excluded was not cross-examination, and (b) when the
matter sought to be elicited (assuming it to be cross-exami-
nation) was fully brought out at a later stage of the trial.
Becker v. Inc. Town of Churdan, 159.

IMPEACHMENT.

Hostility. It is always relevant to inquire of a witness whether he
4 is not hostile to the party against whom he is testifying,
and whether he had not made threats to testify against such
party, and, with proper foundation therefor, the witness may
be impeached. *Porter v. Heishman*, 335.

Contradiction: Competency of evidence. A contract between plain-
5 tiff and an attorney, wherein the attorney agreed to prosecute
an action for damages for a certain injury, is competent to
impeach the testimony of plaintiff "that she had never made
any claim for damages for said injury." *Worez v. Des Moines*
City R. Co., 1.

WORDS AND PHRASES **TO** **WORKMEN'S COMPENSATION ACT**
WORDS AND PHRASES.

"Passenger." Weber v. Railway Co., 358.

"Citizen." Hunter v. Colfax Cons. Coal Co., 245.

"Equal portion." In re Estate of Whittaker, 718.

WORKMEN'S COMPENSATION ACT. See CONSTITUTIONAL LAW; MASTER AND SERVANT; TAXATION.

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